

FOUNDING THE CONSTITUTION OF UGANDA

Essays & Materials

RICHARD OKUMU WENGI

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Editor

Richard Okumu Wengi

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PREFACE

The 7 May 1994 edition of the *Economist* contained an interesting advertisement seeking for Constitutional Lawyers. The announcement ran as follows:

Newly independent country seeks advice in the field, over a short period, not exceeding ninety days, from a British Constitutional Lawyer and similarly from an Islamic Constitutional Lawyer to prepare jointly a new Constitution. Travel and hotel expenses will be met...

Exciting enough for the appropriate candidate. But it was not surprising as it had been a current talk that some of the surviving members of Uganda's most recent Constitutional Commission had been approached with similar offers of exotic adventures and Constitutional Missions around the developing world. Moreover, even that Commission and the Constituent Assembly had engaged similar "experts" from the Commonwealth. What was striking was the fact that some communities still made their Constitutions in this clinical manner.

The fact is that the crafting of a Constitution is both a legal and political ordeal. The craftsmen include devious politicians as well as men of good will and conscience and hard professionals. In our case, the prospective Constitution already has for its precedents the 1967 and earlier Constitutions and a Draft Constitution (DC) to go by. Although the DC is the legal point of reference for the new Constitution, it cannot escape the living ghost of its ancestors. Moreover, the document is ever menaced by the Odoki Commission Report which is itself derived to some extent from the views and memoranda garnered by the Commission from mainly the RC system (80%).

But more important is the spirit behind the creation, the composition, representative quality and the processes of the Constituent Assembly, its goings on etc.; all this is hopefully displayed on the giant screen set against the horizon for all to see. The past politics, alliances, conflicts, confrontations, enmities, associations as well as the current trends, economic realities, rewards, deprivations,

alienations, denials, as well as the stampede for partnerships, alliances, exclusions, victories, defeats, joys and miseries – all these phenomena which are the symptoms of the underlying polity have their colouring streak in the Constituent Assembly process.

It is in light of these manifestations dictated by the short term nature of the expectations of the generation and the class characteristics of our society that we wish to see the current Constitution making exercise. In publishing these essays we seek to encourage the emergence of negotiations and political discourse even if this takes bi-polar contact in terms of dichotomous positions a common front ought to emerge. It goes without question that conspiracy can also be an agreement; alliance emerges from diversity and negotiations can also take the form of solicitation or seduction; collusion can emerge from necessity and strange near opposites can betray stark similarities. This is a crucial dynamic which goes to the core of the matter-forging consensus and unity, out of plural variations and interactions.

We have attempted to collect together a number of essays and materials on some aspects of Constitution making. The book is divided into three parts, the first of which deals with Constitutionalism generally. The second part is dedicated to civil liberties and economic rights, namely, fundamental human rights, land and taxation. The last part of the book is dedicated to the Judiciary and its performance as the guardian of the Constitution. A synoptic table of the 1967 Constitution and the DC is included for purposes of general structural comparison.

The book is thus designed to provide basic materials to any disinterested reader of literature on public affairs or civic studies in Uganda. The materials are recommended for general reading but may be of use to students and politicians as well as lawyers and social scientists. It is also hoped that the essays and materials will be of some use to the Constitution makers, the crafters as well as those who will be able to interpret it in years to come.

This publication comes at a time when Uganda is experiencing, so to speak, the birth process of a posthumous infant; Posthumous in the sense that its several (plural) forebearers, the 1967 Constitution,

the Constituent Assembly; and the NRC are due for demise on the birthdate of the coming baby – the new Constitution. But there has been hopefully put in place, a machinery for guardianship, succession and communal responsibility for the enigmatic infant. This is the challenge that will face Uganda in its second century of existence as a Nation. The rule to remember is TAKE THE BULL by its very HORNS -- or CONFOUND IT!

Okumu Wengi
July 1994
Kampala, Uganda

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LIST OF ABBREVIATIONS

Art.		Article
CA		Constituent Assembly
DC		Draft Constitution
DPP	.....	Director of Public Prosecutions
IMF	.....	International Monetary Fund
NCS	.....	National Council of State
NRC	.....	National Resistance Council
NRM	.....	National Resistance Movement
NYTIL	.....	Nyanza textile Industries Ltd.
PERDS	.....	Public Enterprises Reform and Divestiture Secretariat
RC	.....	Resistance Committee
RPF	.....	Rwanda Patriotic Front
SAAP	.....	Structural Adjustment and Stabilization
UGX	.....	Uganda Shillings
UPC	.....	Uganda Peoples Congress
UPM	.....	Uganda Patriotic Movement

CHAPTER I

AN INTRODUCTION TO CONSTITUTIONALISM

BY GRACE TUMWINE MUKUBWA

INTRODUCTION

A modern state is characterised by the rule of law. One need not be concerned about the origin of the law. The law may be autocratically or democratically created. It may be unwritten, like the common law or the British Constitution or Customary Law for that matter or it may be written. It could also be that such law is easily changed. It may be subject to a higher law which is difficult to change and therefore the ordinary law must be subject to that higher law.

Uganda has opted for a democratic representative form of government, with both written ordinary law and a written Constitution. These laws may be interpreted by the executive or by the bureaucrats but the courts should have the final say as to their validity. It is the commitment to be governed by the written Constitution, that is usually termed Constitutionalism.

The concept of Constitutionalism means minimally that the polity must recognise the nature of political power, its distribution and above all its limitations. Therefore a Constitutional government is one in which government has certain powers that are set within more or less defined limits. If these limits are exceeded, the Constitution is said to have been violated. It should be the duty of the courts to state when these limits have been exceeded. It follows that in a democracy there should be three major organs of government: the legislative organ which enacts the laws in conformity with the Constitution, the executive arm of government which enforces the laws, and, the judiciary which interprets the laws and adjudicates in the disputes between the executive and the citizens who may for one reason or another be aggrieved by the law or by the way the executive is implementing the laws. The Independence of, and separation of powers between, the various organs of government,

will depend on whether one adopts the presidential system as the United States and to a lesser extent France or a parliamentary system as in most of the Commonwealth countries whose Constitutions are based on the Westminster model.

Under the parliamentary system, the leader of the majority party forms the executive and all the members of the executive sit in parliament. In other words, the executive is part of the legislature which blurs the separation of powers. In fact under the Westminster model, the judiciary may be part of the legislature, as is the case with the House of Lords in England. Such lack of proper separation of powers reduces the checks and balances which are the bedrock of the Parliamentary system.

Sovereignty

In a presidential system, the President and his Vice-President are directly elected by the electorate. The President has a free hand in selecting his cabinet and, if a member of the legislature is appointed to the cabinet, he must resign from the legislature. For example, the only member of the American Cabinet in the legislature is the Vice-President, who is the President of the Senate. However, any member of the cabinet, can be summoned to the legislature to be examined on any issue. Under this system, although the President appoints the judges, such judges must be confirmed by the Senate thus limiting the President's discretion.

The advantage of the Presidential system over the Parliamentary system is the effectiveness of checks and balances. It also encourages legislators to effectively represent their constituents without trying to compromise in order to get a cabinet appointment.

The major disadvantages of the presidential system is that it is very expensive to run. It also gives the President unlimited powers especially in areas of defence and foreign affairs. It also means that in a multiparty system the President and the legislature, when controlled by the opposition, may reach a stalemate and paralyse government functions. This has happened in Nigeria, Togo and Zaire. There is no question of votes of no confidence and the resignation of the cabinet and calling of premature elections. The executive can only

be removed for serious breaches of the laws and the Constitution. Only one American President, President Johnson, not Lyndon Johnson, has ever been impeached. President Richard M. Nixon escaped impeachment by a razor's edge.

The Independence Constitution and the 1967 Republican Constitution provided for a parliamentary system of government for Uganda. This system was abused. When the life of parliament expired, in 1967, the members extended it without due consultations with the voters. Twenty three years later, the National Resistance Council (NRC) also extended its term. One is tempted to think that if the executive was not part of the legislature such extensions would have been hard to get.

In the Draft Constitution (DC), Uganda has adopted the Presidential system of government. Thus article 106 provides that the President shall be elected by universal adult suffrage through a secret ballot. One of the qualifications for election as the President is that the Presidential candidate must nominate another person as the Vice-President. He must also be qualified to be a Member of Parliament. A President under the DC is to be elected by a simple majority of the votes cast. But if no candidate gets more than 50% of the votes cast, then there must be a re-run by the two front-runners.

It should be noted that the President is not required to have a constituency and therefore is not a Member of Parliament. Moreover, under articles 116(1) and 117(1), the President is to appoint Ministers and Deputy Ministers "from among Members of Parliament or persons qualified to be Members of Parliament. In other words the cabinet need not be composed of elected Parliamentarians. However, their appointment has to be approved by the proposed National Council of State.

The summoning and proroguing of Parliament is covered by article 148. When a new parliament is elected the President by proclamation is to appoint the date and place of the first session to enable the Speaker and the Deputy Speaker to be elected under the Chief Justice's chairmanship. After that, it is the Speaker who can summon or prorogue parliament. Obviously this would avoid a situation which arose in Kenya where the President just prorogued parliament. And the Speaker is third in succession to the Presidency.

Judges of the High Court and the Supreme Court are to be appointed by the President either with the approval of the proposed National Council of State or on the advice of the Judicial Service Commission.

THE EXECUTIVE

It has often been argued that since the 1967 Constitution, the Presidents in Uganda have been vested with dictatorial powers. But a careful reading of the Constitution and the DC and comparing the two with the American Constitution proves such an argument false.

The 1967 Constitution provides in article 65 that “the executive power of Uganda shall vest in the President”. The power was to be exercised by him either directly or through officers subordinate to him. However, such power was to be exercised subject to the provisions of the Constitution. Moreover parliament had powers to assign some of the functions of the President to any person or authorities other than the President. Such an arrangement in theory, preserved the supremacy of parliament which is contained in article 63. This article provides that parliament shall have the sole power to make laws for the peace, order and good government of Uganda with respect to any matter. And under article 3(1) only parliament has the power to amend the Constitution. It follows, therefore, that the powers of the President were, first and foremost, to be controlled by parliament.

Article 102 of the DC provides that “the executive authority of Uganda is vested in the President” and shall be exercised by him in accordance with the Constitution and the laws of Uganda. It goes on to provide that the functions conferred on the President may be exercised by him either directly or through officers subordinate to him. These powers are wider than those contained in the 1967 Constitution. And this article cannot be easily amended by parliament by virtue of article 289. A bill for an Act seeking to amend article 102 must be supported at the second and third readings by least two thirds of all the Members of Parliament and must be ratified by at least two thirds of all the District Councils of Uganda.

For purposes of comparison, the American Constitution provides in Article Two that the “executive power shall be vested in a President of the United States of America”. In the United States, congress has powers to make all laws which are necessary for carrying into execution the powers conferred upon the congress and other powers vested by the Constitution in the government or any department or officer. It is well known that all provisions of the American Constitution are entrenched. Any amendment to the Constitution must be ratified by three fourths of the states. It means that in America, congress has inherent powers to limit the powers of the President so long as such limitation does not violate the Constitution. Similarly article 132 of the DC vests legislative power in parliament which has powers to make laws for peace, order and good government with respect to any matter, and, is charged with the duty of protecting the Constitution and promotion of democratic governance of Uganda. In short, under the DC, Parliament has powers to control the executive including power to remove the President and censure of the cabinet.

From the foregoing, one may make certain observations. The President’s executive powers thought exercisable in accordance with the Constitution, are exercised at his own discretion and conscience. But parliament has the power and means to limit Presidential powers. Unless and until his power is Constitutionally limited, the decision of the executive in the exercise of his discretion is conclusive. It is up to parliament to define and limit the extent of executive power. Therefore where the President, with a parliament has tended towards dictatorship, the fault lies squarely, for reasons to be discussed later, on the shoulders of parliament. It is the fault of parliamentarians that they have viewed the President as an absolute monarch who must be feared rather than respected and advised. It is not because of the Constitution that one becomes a dictator. It is rather because the checks and balances including the press and the public opinion as the fourth estate have malfunctioned.

Qualifications of President

A person is qualified to be President under the DC if he is a citizen of Uganda by birth. The 1967 Constitution only required the person to be a citizen. Therefore the DC, like the American Constitution, rules out a naturalised citizen from becoming President of Uganda. Now the question is, who is a citizen of Uganda by birth? First, every person born in Uganda either of whose parents or grandparents are or were members of any of the indigenous communities existing within the borders of Uganda as at the first day of February 1926. There are forty eight indigenous tribes set out in the second Schedule to the Constitution. Secondly, every person born in Uganda either of whose parent was at the time of his birth a citizen of Uganda. Thirdly, every person born outside Uganda one of whose parent or grandparent was a citizen of Uganda at the time of his birth. Fourthly, a child of not more than seven years, who is found in Uganda and whose parents are not known is presumed to be a citizen of Uganda by birth.

The category is supposed to cater for scores of abandoned children and is in conformity with International Convention on children. For the first category, the date of 1 February 1926 is rather ill-conceived. The appropriate date should have been 9 October 1962, when Uganda obtained nationhood. There is nothing wrong with trying to give refugees and immigrants citizenship. However, the cardinal rule for granting citizenship is the concept of “allegiance”. Because of this there should not be a blanket grant of citizenship; rather, any person, who is prepared to change his allegiance from any country to Uganda, should put such commitment in writing by applying for registration as a citizen. The mass exodus in 1992 of a whole segment of Uganda National Army that led to the war in Rwanda, is an extreme case which emphasises the doctrine of allegiance.

The other qualifications are that the candidate for the Office of President must be forty years and above with minimum formal education of advanced level standard or its equivalent and must otherwise be qualified to be a Member of Parliament. He must also submit the names of his Vice President in the election and must

prove that his nomination is supported by at least one thousand voters registered and residing in at least two thirds of all the districts in Uganda. The requirement for the age of forty years seems to be uncalled for. The previous age of 35 is good enough, after all even in America where 35 is the minimum age, no person has become President when he was below forty.

Election of President

The election of the President is by universal adult suffrage, through a secret ballot. But Parliament reserves the power to make a law prescribing the procedure for the election of the President. A President is supposed to be elected, where he is in office in not less than two months before the expiration of the term of the President. And in any other case within six months after the Office of the President becomes vacant. The latter provision seems redundant in view of article 112(1) which provides that the Vice President shall automatically assume the Office of the President if the President dies, resigns or is removed from the office. It also does not make sense to hold an election if the expired term of the President is more than two years. Once the Office of the President is vacant other than by expiry of his term, the Vice President should serve the remainder of the term.

A President is elected if he secures more than fifty percent of the valid votes cast. If no candidate obtains the required majority, the two candidates obtaining the highest votes must go for a second election where the President shall be elected by a simple majority of votes. The chairman of the electoral commission has to declare the results within twenty four hours after ascertaining the result. A person elected President when there is a sitting President is supposed to assume office within twenty four hours after the term of his predecessor expires rather than on taking the oath of office.

The High Court is given jurisdiction to determine any question as to whether or not a person has been duly elected President. As to the issue of standing to sue, the DC has been innovative. Standing to sue consists of several criteria which are used to determine under what circumstances a litigant can invoke the court's jurisdiction. Generally there must be a real case or controversy in which injury

has occurred or is immediately threatened. Also the right involved must be a personal one. In most cases one cannot sue on behalf of someone else's rights. Lastly, if it is the action of some government agency or official that is being challenged, the complainant must first exhaust the available administrative remedies.

Contrary to the above, the DC has provided in article 107(2) that any registered voter may challenge the validity of the election of the President by presenting a petition to the High Court within thirty days after the declaration of the result. And a person aggrieved by the decision of the High Court may appeal to the Supreme Court, even if the appeal does not appear to be tied to the original litigant. If this is so, then these are welcome provisions.

The President is supposed to be elected to office for a term of five years and cannot be elected for more than two terms. In other words a President can be in office for a maximum period of ten years. Apart from expiration of his term, death or resignation the President may be removed from office under article 110.

Presidential Emoluments

The Terms and Conditions of Service attaching to the Office of the President are made more elaborate under the DC than in the 1967 Constitution. Unfortunately article 109(1) of the DC is unintelligible. It provides:

The President shall be paid or afforded such other benefits as Parliament shall by law provide.

The equivalent provision in the 1967 Constitution is to the effect that the President shall receive such salary, allowances and gratuity as may be prescribed by Parliament. A similar provision in the American Constitution simply states that the President "shall at stated times receive for his services, a compensation". It would appear therefore that Article 109(1) is to the effect that the President is entitled to remuneration for his services. The President is also entitled to some retirement benefits. However, under the DC, he forfeits the benefits if he is removed from office except for physical and/or mental incapacity. When Parliament has determined the President's salary and other benefits such cannot be varied to his disadvantage

while in office. This also applies to his retirement benefits during his lifetime.

It is submitted that the American provision is preferable. It states that the President's compensation "shall neither be increased nor be diminished during the period for which he shall have been elected". The idea behind such a provision is that the President's exercise of his powers should not be influenced by monetary considerations. Parliament may influence the executive by promises of increased compensation just as much as threats of a decrease. After all the biggest weapon Parliament has to control the executive is its control over finance. This is a weapon that Uganda Parliaments have not used effectively. The general impression one gets in Uganda is that it is the executive that controls finances and taxation. One should remember the slogan of "no taxation without representation".

Like in all other African countries the DC exempts the President from direct personal taxation on his official salary, allowances and other benefits. It is rather anomalous that the highest paid public servant and whom the state expends large sums of taxpayers money should be exempted from paying tax. Even the Queen of the United Kingdom is now paying tax. It is hard to imagine what the President would lose by paying tax. Paying tax would enhance the President's prestige and credibility when extolling to others the virtues of one's civic responsibilities.

Immunity of the President

One understandable privilege of the President is contained in article 101(4). It provides that while holding office, he shall not be liable to proceedings in any court. This gives the President absolute immunity from any civil liability predicated on his official acts. The immunity is supposed to be a functionally mandated incident of the President's unique office rooted in the Constitutional theory of separation of powers and supported by history. It is supported by history in the sense that the 1962 and 1967 Constitutions had a similar provision and also as a reversion to the old notion that a king can do no wrong. It cannot be contested that attaching absolute immunity to the Office of the President places the President above

the law. But the necessity for such immunity is rooted in practical policy consideration.

Under the Constitution and the laws of Uganda, the President has discretionary responsibilities in a variety of areas many of which are highly sensitive. Because of the singular importance of the President's duties, diversion of his energies by concern with lawsuits would raise unique risks to the effective functioning of government. A President must of necessity concern himself with matters which are likely to arouse the most intense feelings. It is in precisely such cases that there exists the greatest public interest in providing the President the maximum ability to deal fearlessly and impartially with the duties of his office. Nor can the sheer prominence of the Office of the President be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits. Cognizance of his personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office, but also the country that the President was designed to serve.

In any case the rule of absolute immunity for the President will not leave the country without sufficient protection against misconduct on the part of the chief executive. There are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is and should be subject to constant scrutiny by the press. There are also incentives to avoid misconduct such as desire to be re-elected, and the need to maintain prestige as an element of Presidential influence. Moreover, the President is and should be subjected to vigilant oversight by Parliament. And if the situation demands there is under the DC the Constitutional remedy of impeachment.

Impeachment

It is because of the grounds for impeachment which are contained in article 110 that article 101(5) appears to have been given very little serious thought. The sub-article states:

Civil or criminal proceedings may be instituted against a person after he has ceased to be President in respect of anything done or omitted

to be done in his personal capacity before or during his term of office and any such proceedings shall not be deemed to run during the period while he was President.

The inclusion of criminal proceedings is misconceived. The President cannot and should not have any immunity from criminal behaviour. Committing a criminal offence is a clear breach of the Presidential oath and therefore a ground for his impeachment. Absolute privilege would place an impediment in the way of the primary Constitutional duty of the judicial branch to do justice in criminal prosecutions. It, therefore, conflicts with the functions of the court. It would upset the Constitutional balance of a workable government and gravely impair the Constitutional role of the courts.

Executive Authority

In a similar vein, article 102(1), vesting the executive authority of Uganda in the President, should have been left to stand alone. Sub-articles 2 to 5 add nothing to what is vested by article 102(1). The sub-articles basically provide that the executive authority of Uganda extends to the execution and maintenance of the Constitution and all laws; that the President shall abide by and uphold the same; and that the executive authority may be exercised through officers subordinate him. The vesting of the executive authority in the President is essentially a grant of power to execute the laws. And he is required by article 101(3) to take and subscribe the oath of the Presidency under which he undertakes to faithfully exercise his functions and *Inter alia* to protect and defend the Constitution and observe all laws. But the President alone unaided cannot execute the laws. He must execute them with the assistance of subordinates. As he is charged specifically to take care that they are faithfully executed, the reasonable implication, even in the absence of express words, is that as part of his executive authority he should select those who are to act for him under his direction in the execution of the laws.

Other Important Powers of the President

The President is under article 101(1) to be the head of state, head of government and commander-in-chief of the armed forces. Under article 127 the President has powers to make treaties, conventions and agreements subject to ratification by Parliament. Also, subject to some conditions, the President has power to declare war or a state of emergency.

In Constitutional theory, the President's powers over external relations do not depend on affirmative grants of the Constitution. Therefore, the powers to declare and wage war, to conclude peace, to make treaties and to maintain diplomatic relations with other countries must of necessity vest in the President. In the vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the powers to speak or listen as a representative of Uganda. Moreover, it is the President who has better opportunity of knowing the conditions which prevail in foreign countries. He has his confidential sources of information from his agents in the form of diplomatic, consular and other officials. It is also suggested that article 128(1) should be re-drafted to make clear that the power to decide about declaration of war be vested in Parliament. The President declares war on the mandate from Parliament. The most important reason for this is that Parliament controls finances.

President's Power to Appoint and Remove

The popular belief has been that since the President has powers to appoint officials, he also has unlimited powers to remove them from office. This seems to be erroneous. The doctrine of separation of powers is generally adopted not only to promote efficiency but also to preclude the exercise of arbitrary power. It is also contended that the purpose is not to avoid friction, but, by means of inevitable friction incidental to the distribution of governmental powers among three departments, to save the people from autocracy. In order to prevent arbitrary executive action, the DC provides in terms that Presidential appointments be made with the consent of a specified organ or Parliament. The removals must require like consent in certain cases.

The President can remove all executive officers without the consent of any authority. However, those powers do not include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President. Thus the President does not have unlimited powers to remove a member of the judicial branch. Similarly, persons holding quasi-legislative and quasi-judicial positions do not fall under the President's unlimited powers. This category would include the Director of Public Prosecutions (DPP) and members of the commissions and other officers appointed for a fixed term. In the case of quasi-judicial and quasi-legislative positions, the rationale for limiting the President's power of removal, is that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will. In case of officers appointed for a fixed term, the rationale is that no removal can be made during the prescribed term for which the officer is appointed, except on one or more of the causes named in the Constitution or any applicable statute.

Removal of President

The President can be forcefully removed from office under two sets of grounds. The first set consists of abuse of office or wilful violation of the oath of allegiance and Presidential oath or any provision of the Presidential oath. The President swears allegiance to Uganda and to preserve and protect the Constitution and to uphold and observe the laws of Uganda. He can also be removed for misconduct or misbehaviour. That is if he has conducted himself in a manner which brings or is likely to bring the Office of the President to hatred, ridicule or contempt or disrepute or that he has dishonestly done any act or omission which is prejudicial or inimical to the economy of Uganda. Under these "offences" the removal of the President is as follows:

A notice signed by more than one third of members of parliament, stating the intention to move a resolution to remove the President and the specific offences must be submitted to the Speaker who immediately sends a copy to the President. The Speaker has to request the Chief Justice to constitute a tribunal consisting of three Supreme

Court judges to investigate the allegations and report to Parliament stating whether or not a *prima facie* case for the removal of the President has been made out. In law, a *prima facie* case means that the available facts and the evidence are such that in the absence of a defence there will be a conviction. The President is entitled to appear in person or by any other person of his choice. If the tribunal determines that there is a *prima facie* case and Parliament passes a resolution supported by not less than two thirds majority, the President ceases to hold office. In Parliament too, the President is entitled to appear or to be represented.

Another set of grounds for the removal of the President is physical or mental incapacity, namely, that he is incapable of performing the functions of his office by reason of physical and mental incapacity. The procedure for the removal of the President is similar to what is described above except that the tribunal is a medical board constituted by the Director of Medical Services at the request of the Speaker.

This procedure should be compared to the procedure under the American Constitution. Likewise under the DC the removal of the President is a political act reserved solely for the legislature acting on a resolution of a two thirds majority.

When the resolution for the removal of the President is being debated, the Chief Justice presides over the legislature, which is constituted into an impeachment court. The role of the Chief Justice is to guide the legislature on procedure. Once a resolution removing the President is passed it cannot be challenged in any court. In other words it is a political act which is not justiciable in court. A similar interpretation to a similar provision was given in a Nigerian case involving the removal of the Governor of Kaduna state.

It is submitted that the American procedure is simpler and avoids involving the judiciary in decisions which can compromise its independence and credibility. It would, therefore, be preferable that the impeachment procedure in the DC should be simplified by constituting Parliament into an impeachment court presided over by the Chief Justice. In other words, there should be no tribunal consisting of judges. After all what constitutes a *prima facie* case in political terms is different from a *prima facie* case in legal theory.

In the case of resignation, the President resigns his office by letter addressed to the Chief Justice. The resignation takes effect immediately the letter is received. Then the Chief Justice informs the Speaker, the Vice President and the Electoral Commission of the resignation. The Vice President is supposed to assume Office of the President for the unexpired term if it is less than two years. If it is more than two years, an election must be held within one year after the assumption of the Office of the President by the Vice President.

THE LEGISLATURE

One may need to be reminded that it is the Constitution which organises the government and assigns to different departments its powers. The powers of the legislature are carefully defined and limited. There are written Constitutions because that was seen as the only way of reminding the legislators, the executive and the governed of the powers of the legislature. The limits set by the Constitution cannot be exceeded. If they are, then such acts that are not in conformity with the Constitution are void because the Constitution is supreme.

It has been argued before that dictators in Uganda have been a result of the exceedingly vague powers given to the legislature in relation to the powers vested in the President. It is in this regard that the 1967 Constitution contains only one article of twenty nine words about the powers of Parliament. Article 63 provides:

Subject to the provisions of this Constitution, Parliament shall have sole power to make laws for the peace, order and good government of Uganda with respect to any matter.

Cynically, the only other article under the powers of Parliament goes on to dilute the above provision by giving the President the authority to usurp the powers of Parliament by giving him legislative powers. This, serves as the fertile egg that breeds dictators. All the President has to do is to dissolve Parliament and rule by ordinance (decree).

In this regard, the DC is an improvement on the 1967 Constitution and is more aligned to the Presidential system and in accordance with the doctrines of separation of powers and checks

and balances. Unlike the 1967 Constitution, under the DC, the President is not supposed to be a Member of Parliament (Art. 122), has no legislative powers (Art. 132(4), cannot prorogue Parliament (Art. 148(2) or dissolve Parliament (Art. 149). That means that the President cannot operate under the DC without Parliament.

The powers and functions of Parliament are much more fully set out in the DC than in the 1967 Constitution. The legislative power of Uganda is vested exclusively in Parliament, which does not include the President, to be exercised in accordance with the Constitution. Article 132(4) clearly states that no person or body other than the Parliament shall have powers to make provisions having the force of law in Uganda except under the authority conferred by the Constitution or by an act of Parliament.

Parliament alone is to make laws for the peace, order and good government with respect to any matter. Such laws are to be for the well being and development of Uganda. They must also be such laws as will protect the Constitution and promote the democratic governance of the country. Moreover Parliament has the ultimate weapon of controlling the executive by impeachment. Parliament is in various articles given powers to approve presidential appointees to various high offices. Of course some of the consents to appointments and removals are supposed to be made by the National Council of State.

A Council of State?

The DC proposes what has been termed a one and half legislature. The half is known as the National Council of State composed of about 59 members indirectly elected from the cabinet and Parliament. In sum, its main function is supposed to be a bridge between Parliament and the executive and between the executive and local governments. Another major function is to approve some presidential appointments to and removals from certain offices. Most of the presidential nominees require approval. On the other hand, very few removals require any approval. Even where an approval is required for a proposed appointment, there is no implied power of veto on removals. The reasons for this are obvious.

A veto by any body upon removal is a much greater limitation upon the executive branch. It is also a much more serious blending of the legislative with executive functions than a rejection of a proposed appointment. Moreover, a rejection of a proposed nominee of the President for a particular office does not embarrass him in the conscientious discharge of his duties in the selection of those who are to aid him. The reason being that the President usually has an ample field from which to select for office, according to his preference, competent and capable persons. Parliament should have full power to reject newly proposed appointees whenever the President should remove incumbents. Such a check will enable Parliament to prevent the filling of offices with bad or incompetent people or with those against whom there is a tenable objection. But this is a power which can be exercised by Parliament and there is no need for a hybrid of the executive and Parliament in the name of the National Council of State (NCS).

But NCS confuses the functions of the executive and parliament, two co-equal branches, and renders the checks and balances ineffective. The fact that it is indirectly elected deprives it of legitimacy. Because the President, Vice-President and 10 cabinet ministers appointed by the President will sit on it, this makes it look as an over-bloated cabinet rather than an independent body. In any case any independent observer will think it over-cynical for a President to appoint a person on the advice of the cabinet and then sit with the cabinet to approve the appointment. Moreover, if the NCS is supposed to resolve conflicts between the legislature and the executive, it will, in performing that role, usurp the powers of the judicial branch. The NCS is also objectionable not only because of its unnecessary expenses but also for the fact that it is likely to assume the powers of Parliament when it is not directly elected by the people. It may even assume the powers of the cabinet. An astute President can play the NCS against the cabinet and Parliament and thus be left free to do what he wants no matter how arbitrary. For these reasons the NCS is not a useful innovation. Moreover, its life-span is dependent on Parliament and a dissolution of Parliament arising from conflict in the NCS results necessarily in the latter's dissolution.

There is a half-hearted attempt to strengthen Parliament in article 116(1) which stipulates that ministers shall be appointed from among Members of Parliament or persons qualified to be elected Members of Parliament. It cannot be contested that a person should not be denied an opportunity to serve his country as a minister simply because he is a Parliamentarian or because he was not elected to Parliament. However, the danger of appointing ministers from the Members of Parliament has recently revealed its detrimental effects. Parliamentarians are willing and eager to catch the President's eye by saying what they assume he wants them to say and generally doing his bidding so as to secure a cabinet post. The NRC has provided the worst scenario of this kind of behaviour. Whenever an important bill is to be introduced or one in which the President has a lot of interest there is always a rumour of a cabinet reshuffle. Once this rumour gains currency such bills end up being passed unanimously.

Independence

This is bad for democracy and is particularly bad in a presidential system. Parliament in a presidential system is supposed to be the counter balancing force against the executive irrespective of which party controls the executive or the legislature. Because the President does not resign when he loses an important bill in Parliament, such as a Finance Bill, there is no urge for party members to toe the party line. Thus they are much more independent of party control. They are, first and foremost, controlled by their constituents. They fight for local projects and their funding within the articulated national interest. It is this independence and the provisions of law which enable members to check and balance the executive. And in case of a serious conflict, the issue will be referred to the judiciary, another coequal branch of the government. It is, therefore, suggested that in order to make the separation of powers effective and the checks and balances functioning, whoever is appointed minister from Parliament must resign his seat and a by-election held.

Although the DC is certainly an improvement on the 1967 Constitution on powers of Parliament there is a need to detail its specific powers as was done in the American Constitution. For example, the powers of taxation could be specifically allotted to

Parliament. Under the DC the taxing powers of Parliament are not all that clear. Article 146 provides restrictions on Parliament with regard to certain financial matters. It is to the effect that Parliament shall not debate any taxing bill directly or indirectly except for reduction of tax unless such a bill is introduced by the President. Yet article 178(1) provides that no tax shall be imposed except under the authority of an Act of Parliament. The implications seem to be that the taxing powers are vested in the President, and Parliament can either approve or veto the acts of the President in this regard. Other matters which should be specifically allocated to Parliament include; the power to declare war, borrow money on the credit of Uganda, naturalisation, establishment of inferior courts and withdrawal of money from the consolidated fund or any other fund of Uganda. If Parliament cannot control taxation, borrowing and expenditure of finance, it will not be able to control the executive at all.

Presidential Assent

There is a minor restriction on the legislative powers of Parliament contained in article 144. The article provides for laws to be made by Parliament through bills assented to by the President. When a bill is passed by Parliament, it must as soon as possible be presented to the President for assent. The President must within thirty days either assent to the bill or return it to Parliament with a request that the bill or a particular provision of it be reconsidered. If the President fails to do either of the acts specified within thirty days, he is deemed to have assented to the bill which automatically becomes a law. If the President refuses to assent to the bill or vetoes it, such a veto can be overridden by the bill being passed by a two-thirds majority of all the Members of Parliament. And such a bill becomes law without the assent of the President. All laws passed by Parliament come into force on publication in the Gazette. This condition contains the best example of the doctrine of checks and balances while at the same time asserting the supremacy of Parliament in legislative matters. Publishing of the bill provides the nominal answer to the presumption that ignorance of the law is no defence.

Parliament's power and independence is re-enforced by articles 148-151. Apart from the first meeting of Parliament for purposes

of electing the Speaker and his deputy which is summoned by the President by proclamation, the Speaker is the person in control of Parliament. He is the one who summons it and it can only be dissolved, more or less, by expiration of its terms or any extended term in case of war or emergency. Such an extension under article 130(3) can only be for a single period of twelve months. Also, Parliament can be dissolved if a two-thirds majority of all the members so resolves (Art. 922(c). In other words, unlike in the 1967 Constitution the President has no Constitutional powers to dissolve Parliament.

Vacation of Office, Recall

A Member of Parliament can vacate his seat on the grounds stipulated in articles 135 and 136 of the DC. These include resignation: if circumstances arise which would disqualify him as a Member of Parliament; on dissolution of Parliament; may be expelled for contempt of Parliament without the permission of the Speaker; grave violation of the leadership code; if he is recalled by the electorate; if he crosses the floor or if he is an independent candidate and he joins a political party.

The last three conditions call for some comment. The recall provision in article 135(a) is amplified by article 136. Apart from mental and physical incapacity the grounds and procedure for the recall of a Member of Parliament are to be determined by Parliament. The DC only states that a petition for the recall of a member shall be delivered to the Electoral Commission signed by one-third of the registered voters of the Constituency stating that the people have lost confidence in the Member of Parliament. If, after reasonable inquiry the Electoral Commission is satisfied about the genuineness of the grounds in the petition and the number of voters supporting it, the Commission will declare the seat vacant. Although the provision is well intended, it can be abused. The minority who voted for a loser can harass the winner with votes of no confidence.

For members who cross the floor or join parties after standing as independents, there is some reason that such people should seek fresh mandate. The mentality of following the winner and abandoning the loser must be contained if democracy is to blossom. This will reduce

political opportunism. But if a cabinet minister can be chosen from people who are not Members of Parliament, the above provisions will have very little deterrent effect.

THE CONSTITUENT ASSEMBLY

Under section 4(1) of the Constituent Assembly (CA) Statute, 1993, the purpose of the Constituent Assembly is “scrutinising, debating, enacting and promulgating” a new Constitution of the Republic of Uganda. And section 8(1) gives the functions of the Assembly as “scrutinise, debate and prepare a final draft” and “to enact and promulgate” a new Constitution. And the preamble states that “a representative Constituent Assembly be established to scrutinise, debate, finally redraft and enact the Constitution”.

The intention of the legislature leaves no doubt. The power to make the new Constitution is by the statute vested in the Constituent Assembly. It is to debate, prepare a final draft (or redraft), enact and promulgate the new Constitution. This power and authority is not delegated to the Assembly. Therefore, there is no residual power which can be exercised by another person or body. The only power not vested in the Constituent Assembly relates to contentious matters as defined in section 17(3)(f). But the NRC is also exercising its powers over legislation including the CA Statute.

Contentious Matters

The Assembly is supposed under section 17 to reach its decisions by consensus. But where there is no consensus the chairman may make a ruling that the matter be resolved by voting. If the chairman does not make a ruling then any member supported by at least 50 members may propose that the matter be carried by two thirds majority. The matter is to be regarded as contentious if the motion is supported by the votes of the majority of the delegates voting but does not obtain the support of 2/3 majority. If this happens and the matter is of a national character, then it can be presented to the nation for resolution through a referendum. No referendum is to be held on a contentious matter that is of a local character to a particular region, district or community. This seems to suggest the

list of contentious matters is likely to be short. Very few issues are likely not to get a two thirds majority of those voting (not of all the members) and under section 15(1) the quorum of the Assembly shall be the chairman, who is not allowed to vote and 50% of the delegates. So in effect this may mean two thirds of 50% of the delegates. In summary the contentious matter must fail to get the required majority and must be national in character.

With the removal of the issue of monarchy from contentious issues, the matters that may generate sharp divisions may include political parties, electoral system, citizenship, land ownership and National Council of State. Assuming, of course, that the issue of federalism does not raise its head.

In this connection, therefore, Section 18(3) and (4) are rather curious. The sub-sections state:

- (3) Without prejudice to sub-section (i) the President may, upon the advice of the cabinet, at any time before, during or after the deliberations of the Assembly, direct that any issue or specified issues be resolved by a referendum.
- (4) Whenever the President directs that a referendum be held under sub-section (3) any decision of the Assembly on the issue or issues, presented for decision at the referendum shall be confirmed or varied by the outcome of the referendum which shall be final and conclusive.

Section 18(1) talks about a referendum only where there is a contentious matter of national character. Moreover section 18(3) does not say that it is without prejudice to section 4(1) and section 8(1). Therefore section 18(3) must be subject to sections 4(1) and 8(1). In other words the power to prepare a final draft, enact and promulgate the Constitution is still vested in the Assembly. So how will a referendum be held 'after' the deliberations of the Assembly? In any case even a referendum 'before' or 'during' the deliberations does not cure the defect.

The theory behind section 18(3) and (4) seems to be that the delegates are delegated power by the people who can therefore take away that power and exercise it themselves. This theory is not supported by the legislative scheme of the statute. The Assembly is

given original power to come out with the Constitution. In the exercise of this power, it is not subject to the control or direction of the electorate save in the case of contentious matters of national character.

An analogy with company law may help to illustrate the point. The shareholders in a company are theoretically the owners. They elect the directors to run their company. Generally the Articles of Association will vest the management of the company in the board. Once this happens even the numerical majority of the members cannot give directions to the board or countermand the board's decisions. Similarly the statute, in the preamble, and in section 4(1) and 8(1) vests the Constitution making powers in the Assembly, which alone can resolve the issues to be included in the Constitution except for contentious matters of national character where the power of the electorate is preserved.

Another important issue raised by section 18(3) and (4) is the role of the President and the Cabinet. Cabinet members in the Assembly will only be delegates. Therefore, one wonders how the Cabinet will advise the President on Constituent Assembly issues needing a referendum. It should be remembered that the President and the cabinet have unquestioned and unlimited political powers but not legislative powers. In this case legislative powers are vested in the Assembly and on a few issues the voters.

Elected Delegates

Under sections 5 and 6 a person is qualified to be elected if he is a citizen of Uganda, has attained the age of 18 years and has paid all his taxes or made satisfactory arrangements to pay them. NRC members and persons holding public offices are qualified to stand. However, the latter **must** apply for leave of absence at least 30 days before the commencement of nomination day. It is mandatory that the employer must grant such leave of absence for such a period as may be requested by the employee with or without pay. But he must surrender any vehicle or other things of the employer which **shall** not be used for purposes of campaigns. Those intending to stand must have sufficient knowledge of English as by section 14 the proceedings and records of the Assembly must be in English.

Basically the intending delegate must neither be of unsound mind, nor owe allegiance to a country other than Uganda, must not be an undischarged bankrupt, be under a sentence of death, is not disqualified by any professional body to practice his profession, and, within the last ten years, has not been convicted or imprisoned for an offence involving fraud, dishonesty, moral turpitude or violence or an offence relating to elections.

It is important that an intending delegate must be registered as a voter. And one is not qualified to be registered as a voter unless he originates from the electoral area or resides in the electoral area or works in gainful employment in the electoral area. An electoral area is an area designated as such by the Commissioner. But under the third schedule rule 2(2) the Commissioner is directed to **only** designate every county and every municipality as an electoral area. In effect then this means that one must only register and be voted for in the county where he resides or works or comes from. And where the county has more than 140,000 people such a county will be divided into electoral areas with a population of approximately 70,000. Read literally, this population quota and the direction that the Commissioner shall only designate a municipality and the county as an electoral area would mean that the Commissioner must create new counties where the old one has over 140,000 people. For example, four new counties would be created in Bukoto county. The problems related to this will be highlighted below. But the legal problems related to the inflexible county formula can be gathered from the following American cases.

In the case of *Brown v Thomson* 462 US 835 (1983) a problem of constituency making came to the Supreme Court involving the Wyoming Constitution. Among other things the Constitution provides that each of the states 23 counties shall have at least one representative and that the remainder of representative constituencies shall be apportioned among the counties on a population basis. When the apportionment was done in 1980 it resulted in an average deviation (overrepresentation) from population, equality of a minimum of 16% and a maximum of 89%. The states least populated county, Niobrara (op.2924), got one representative to the legislature having provided that a county would have a representative even

if the statutory formula rounded the country's population to zero. Some voters brought an action challenging the Constitutionality of the demarcation: In *Niobrara's* case the deviation or call it overrepresentation was 60% compared to an ideal constituency size. The divided court of 5 to 4 held that Wyoming law was not unconstitutional. However, in the same year the court reversed itself in the case of *Karcher v Dagget* 462 US 725 (1983).

In New Jersey the legislature enacted a constituency plan. Of the 14 congressional constituencies, the average population per constituency was 526,059 persons. The largest constituency had a population of 523,798 giving a deviation of under 1%. The state argued that a deviation of 1% was justifiable. It was even suggested that a deviation of 5% needed no explanation. These arguments were rejected. In holding the plan unconstitutional the court said that population equality must be adhered to without any pre-ordained standard deviation thereby reversing *Brown v Thomson*.

Political Equality: Equipopulus Constituencies

Article 8(1) of the DC, which has similar provision with the Fourteenth Amendment of the American Constitution, provides for equal protection of the laws. In interpreting the amendment the courts have laid down that "if discrimination is sufficiently shown, the right to relief under equal protection is not diminished by the fact that discrimination relates to political rights". The most controversial of political rights is political equality in relation to constituency making and therefore representation.

It was in *Reynolds v Sim* (1964) that the court laid down the guidelines and rationale for holding constituency malapportionment unconstitutional. The reason given was that the right to suffrage (vote) is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights. Constituency making constitutes an invidious discrimination violating the rights asserted under equal protection in that the rights allegedly impaired are personal in nature.

Therefore, any alleged infringement of the right to vote and be voted for must be carefully examined. If it is provided that the votes of citizens in one part of the country should be given more weight than the votes of a citizen in another part of the country; it can hardly be contended that the right to vote of those residing in the disfavoured part or area had not been effectively diluted.

Naturally the effect is the same where the same number of representatives represent unequal numbers of constituents. Overweighing and over valuation of the votes dilutes the votes of those living in the disfavoured area. In other words the equal protection provision requires every government to govern impartially. Therefore, when the government adopts rules governing its election machinery or defining electoral areas, those rules must serve the interests of the entire community. If they do not, they violate the fundamental guarantee of equal protection and will be struck down by a well disposed tribunal.

Two questions shape the result. It must be considered whether the population differences among the constituencies could have been reduced or limited altogether by a good faith effort to draw constituencies of equal population. The aggrieved party must bear the burden of proof on the issue. If it is established that the population differences were not a result of a good faith effort to achieve equality, the government must prove that each significant variance between constituencies was necessary to achieve some legitimate goal.

Any number of consistently applied legislative policies might justify some variance. But still the overriding factor must be equipopulus. Because adopting any standard other than population equality would subtly erode the Constitutional ideals of equal representation. The principle of equipopulus is not unjust or socially harmful. Therefore, there cannot be *de minimis* population variations, which nevertheless meet the Constitutional requirement without justification. Because a formula that is not based strictly on population leads to discrimination.

The resulting discrimination can be easily understood. The right to vote is simply not the same right to vote as that of those living in favoured areas. More people must vote before the effect of this voting is equivalent to that of the people in the favoured areas.

Take for example Kole county in Apac with a population of 115,179 and Kyamuswa in Kalangala with a population of 7,179. Each will be represented by one delegate. This means that for each one vote in Kyamuswa there must be 15 votes in Kole. And the deviation or overrepresentation is 1000%. This deviation increased with counties like Ruhinda (Pop. 134,251), Buyaga (pop. 133,128), Buwekula (pop. 131,401), Budiope (pop. 130,775) Bunyangabo (pop. 128,256), (Kagomo (pop. 126,299) and many others in the same category.

Even if one takes a district as a whole the same problem comes up. For example, Hoima (pop. 197,851) and Kisoro (pop. 184,000) will have two representatives while Moroto with a municipality and five counties will have six representatives; that is, one vote in Moroto will be matched by 13 votes in Hoima and about 12 in Kisoro.

Weighing the votes of citizens differently by any method or means merely because of where they happened to reside hardly seems justifiable. A body, like the Constituent Assembly, which is to be responsible for enacting a law by which all citizens are to be governed and their rights determined should be a body which is collectively responsible to the popular will.

Consequently the concept of equal protection requires and indeed demands the uniform treatment of persons standing in the same relation to government. But section 4(2) and rule 2 of the Constituent Assembly Statute embodies invidious discrimination contrary to Article 8(1) of the Constitution. Let it be repeated for emphasis that with respect to allocation of legislative representation, all voters as citizens should be in the same relation irrespective of where they reside.

Originating or Working or Residing in the Electoral Area

This is a rigid requirement whose value is doubtful and Constitutionally questionable. In a democratic society what danger is apprehended by any citizen who is qualified and registered to vote casting his vote in any place and for whoever he chooses. The democratic right to vote involves no more than that each person should cast one vote.

It makes the voting exercise less cumbersome to the voter and less costly. Take an example of a person who originates and was working in Kyamuswa. After registering for voting he is transferred to Moroto. Where will such a person cast his vote?

An analogy can be made with the case of *Shapiro v Thompson* 394 v 618 (1969) in which a woman moved from one state to another with her two children. She was indigent but was denied assistance because the state's law required one year's residence before one could qualify for welfare: the court held that law unconstitutional *Inter alia* on the ground that the Constitutional concept of a person's liberty requires that all citizens be free to move throughout the country uninhibited by statutes, rules or regulations which unreasonably burden or restrict such movement. In Uganda article 19 of the Constitution guarantees freedom of movement.

CHAPTER II

THE CONSTITUTION AS A BASIS OF POLITICAL AND SOCIO-ECONOMIC DEVELOPMENT: SOME ISSUES

BY *PROF. FREDERICK E. SSEMPEBWA*

INTRODUCTION

In tackling the topic, the first question is “Can the Constitution be the basis of development or is the Constitution itself shaped by the mode and level of development?”

There is a view that the Constitution, like any other law, is determined by the mode of production and the level of political and economic development in society.¹

While this view is valid to a great extent, it can be reconciled with another, that, the Constitution as the basic law, guides society to achieve its development objectives.

That the Constitution can be the basis of development although its nature is greatly shaped by society, can be illustrated by reviewing traditional political structures. The first is one which consists of self-sustaining family units. There is no economic specialisation and hence there is very limited social interaction through exchange. The development objective is no more than to satisfy natural necessities. A very simple political structure based on family or clan is all that is necessary to oversee the limited social relationships.

At a higher level of specialisation, the people have branched off into hunters, cultivators, pastoralists, artists, etc. The necessity for exchange and hence social interaction arises. This interaction goes beyond family and clan because it is based on economic exchange. Therefore, the political structure must also be such that it transcends family and clan. Thus arose the centralised systems of governance

1 Y.P. Ghai; *The Political Economy of Law: A Third World Reader* (1987 Delhi Oxford University Press)

where a king or paramount Chief presided over several clans or chieftains. In order to be effective, the paramount ruler must use the agency of other chiefs or clan heads and councillors in order to bring about public participation, discussion and consensus. A more complex Constitutional structure begins to emerge.

What can be observed from the above two examples is that an appropriate Constitutional structure should be moulded around the social setting. But the structure can guide and reinforce political and economic development. The political and Constitutional structure provides preconditions for development. Some of the important preconditions are peace and stability plus equitable distribution of resources. In our traditional setting, political organisation was geared at ensuring these preconditions through the superintendency of clan heads, chiefs or kings.

In the pre-colonial period, socio-political relations were to a great extent harmonious within a given political unit e.g. clans or kingdom. They featured a mixture of discussion, consensus and a habit of obedience to recognised authority. Of course there were occasional upheavals where the norms governing the relations were not adhered to or fell behind or were allowed to fall behind new developments. In that case, the norms were consciously changed to suit the new development.²

What distinguishes the pre-colonial from the colonial Constitutional structure is the absence of antagonistic social forces in the former. The rulers of the pre-colonial period derived power as trustees of resources and not as a group controlling the means of production. The antagonistic element was necessary in the colonial structure because of these policies:

- (a) Local societies had to be covered under a new political regime which implied the destruction or modification of the traditional structure.
- (b) For colonialists' interest, these societies had to be integrated into the economy of the new regime so as to supplement its requirements in terms of raw materials.

2 When succession to the Buganda throne became chartered because of the factional fighting that accompanied it, the role of the Kasujju as keeper of the princes was modified so that he could give an indication as to the most suitable prince to succeed to the throne.

These were not very welcome measures. These implementations implied a coercive Constitutional structure devoid of discussion and consensus. Thus the colonial government through the Governor, became the sole authority governing through ordinances. These were implemented without question either directly through the colonial civil service or indirectly through the agency of traditional structures. Some of these e.g. the Kingdoms were tactfully left with a semblance of authority so that they could assist to implement colonial policy.

Was the Constitutional structure conducive to development? It must be admitted that colonisation paved the way for rapid progress especially on the economic side. Uganda benefitted from growing and exporting cash crops such as cotton and coffee. Social amenities introduced (such as hospitals, schools, communication network, etc...) were the manifestations of growth.

In spite of such economic advance, the people generally remained subjugated and impoverished. The colonial Constitution did not provide for the producers to participate in the decisions concerning the organisation of production and the disbursal of the wealth produced.³

Major steps taken unilaterally such as the land settlement succeeded in creating antagonistic social forces that are the foundation of many problems that exist up to date. In denying discussion and consensus of the people, colonisation removed the vital basis for development.

The lesson to be learned from the above summary is that there is a dire necessity for involving the people in governance so as to give maximum effect to their aspirations. Needed is a Constitution chosen by the people as the best protector of their own interest. In the process of making the Constitution, these questions must be addressed:

- (a) What type of development does Uganda want?
- (b) What are the ideal conditions for achieving that development?

3 The people had to rebel against the establishment even against their king who was seen to be a puppet of the colonial government. See Mamdani: *Class Struggles in Uganda for Review of African Political Economy* p.37.

(c) What is the end result for development?

Does the Draft Constitution address these questions? There has been some attempts to do so although there is still room for improvement. In summary the basis of all future political development are the people in whom sovereignty is vested. The people are to be the foundation of political power which power would normally be exercised by their chosen representatives.

The culture of tolerance, recognition of unity in diversity and inborn freedom of Ugandans to pursue their interest is a fundamental issue. More will be said about this later on. For the time being, let the discussion turn to ideal conditions for development.

IDEAL CONDITIONS FOR DEVELOPMENT

Stability

Stability is an important precondition for development. Here reference is to both political and economic stability. While it is important that political upheavals of the past be avoided, it is also important to avoid policies that disrupt the economy e.g. through currency manipulation or undue interference with highest forces.

As far as political stability is concerned, what Uganda's Constitution should address is the issue of peaceful succession to government. In my view, it is no longer necessary to be preoccupied with the possibility of grabbing power by the armed forces.

An element of that pre-occupation is Chapter One of the draft Constitution especially where it prohibits taking control of the Government unconstitutionally and goes on to state:⁴

Any person who ... by any violent or other unlawful means suspends or overthrows or abrogates this Constitution or any part of it or attempts to do any such act or aids or abets in any manner such a person, commits the offence of treason and shall be punished according to law.

The provision recalls the 1966/67 changes plus the military takeovers (1971 and 1985). Obviously Ugandans look back with disdain at

such episodes in their history to the extent that they might not find it difficult to enshrine the quoted article in their new Constitution.

In my view, the use of naked forces to grab power in today's world is becoming as irrelevant as the Constitutional provisions for preventing this already are. While the possibility of stopping a Babangida backed by the entire military might of the State is nil, (despite a similar provision in the Nigerian Constitution) political consciousness in the people of the world today (Africa included), is leading to more and more effective challenges to governments that have come up through naked force. Military dictators are aware of this consciousness. No more do such dictators rely on naked force alone to perpetuate themselves. They will usually concoct some measures that purport to legitimise their power and draw some support from a cross-section of the population.

While there is no harm in enacting the provision in Chapter One, much of which are geared to military take overs, it is crucial to have Constitutional provisions that guarantee:

- (a) That the people have a real opportunity to choose freely who of the contenders for power will lead them in a given period.
- (b) That the people are able to participate fully in their own governance while at the same time their leaders are fully accountable.
- (c) That the people can terminate the mandate of their leaders if they cease to act in the public interest.

This is what is implicit in the declaration of sovereignty of the people and the political objectives in the Chapter on "Directive Principles of State Policy".⁵ This is what is implicit in the Chapters on the Executive,⁶ the Legislature, the Council of State,⁷ the Representation of the people⁸ and the Federalised/Decentralised enshrined in the Chapter on Local Government.⁹ All these provisions should be

5 Article 3(2) of the Draft Constitution.

6 Chapter 3.

7 Chapter 7.

8 Chapter 8.

9 Chapter 9

carefully analysed in order to assess their possible contribution to stability and hence development.

I am aware that some aspects of these Chapters are more topical than others. For example, Representation of the people will attract debates between the two groups, the pro-Movement and the pro-Party groups. A lot has been said about the proposal in relation to the freedom to associate and organise politically and yet the political situation continues to alter drastically while the Draft Constitution anticipated a no-party state accommodating all political groups and opinions.

What transpired during the CA electioneering and after the election made it clear that NRM emerged as a new and strong political force prepared to accommodate only people of its own line of thought.

It would be inappropriate to institutionalise a Movement as a political group because the end result would be a one-party state.¹⁰

It is significant that the Draft Constitution specifically outlaws a one-party state.¹¹

The guiding principle of participatory democracy through federalism/decentralisation is to devolve functions, duties and responsibilities from the center to the local unit and also to decentralise at all levels from the higher to the lower local government units.¹² As the local government systems (and the nomenclature) is chosen the questions that should be answered are:

- (a) Is the system conducive to political and economic stability?
- (b) Does it provide for maximum development of the unit as well as the nation?

Answers to such questions are very much beside the historical reasons why some groups may press for particular forms of local government. It is obvious, for example, that there is an important pressure group for the Buganda kingdom as a unit in the local

¹⁰ Chapter 13.

¹¹ Article 991.

¹² E.F. Ssempebwa: The Control of Political Power in the New Constitution of Uganda (Paper delivered to the seminar on Democracy and Development at Kampala, July 1993).

government system. The Draft is based on the district as the federal/ decentralised unit.

But the Buganda pressure can be reconciled so long as the principle of decentralisation from the higher to the lower unit is accepted.

A Constitution is a compromise. The historical grievance because of the attempts to obliterate Buganda from the maps are well known. In the interest of harmony the draft could be modified to reflect a general council for ethnic based local units where desired. The council could oversee the activities in its region provided the principle of decentralisation is adhered to. In other words, district and local units below would be the organs to which most functions and powers are devolved.

In accepting this or any alternative, the financial hardships that it could cause on the people is something to be tackled.

A STRONG DEMOCRATIC TRADITION

A Constitution may set up elaborate provisions for political stability which could remain paper guarantees. The provisions such as those for fair elections, participatory democracy and control over the use of power are necessary but must be supported by a strong democratic tradition. Uganda so far has had a weak democratic tradition. Because of the country's history which determined the nature of politics we have experienced, civil society became disunited. The hope that a united Uganda was to be built on the foundation of the 1962 compromise was shattered when the Constitution was abrogated. The chaos that followed further fragmented society making it too weak to stand against dictatorship.

Moreover, the institutions that had been created to support democracy were either disregarded or their functions misdirected to support dictatorships in power.¹³ In order to build a strong democratic tradition, institutions such as the army, the police and the courts should be rehabilitated and facilitated to work independently and in the public interest. Civil organisations e.g. trade unions and activist groups must be allowed freedom of action.

13 e.g. the Judiciary, the police, the Army, the Political Parties etc.

Above all leaders must show commitment to legality under all circumstances. This is very crucial in Uganda because the behaviour of leaders has a real demonstrative effect on the population. Here an example can be taken from the recent C.A. elections. Many of the honourable persons who passed the Constituent Assembly Statute in the parliament proceeded to stand for elections to the Constituent Assembly. In spite of the fact that the law they passed prohibited campaigning, many employed all sorts of devices to achieve what the law was meant to prevent. Towards the end of the exercise, there was hardly any pretence at observing the election law.

Come the next election, what behaviour would one expect from a population which was given the impression that an election must be won by the person or group they support whatever the methods?

To prohibit campaigning is an example of a legal fantasy. The effect could not be achieved and in fact the electoral authority were impotent against a practice that dislevelled the ground for many aspirants that did not have the excuses that government officials had to address the people every other day.

THE CONSTITUTION AND THE ECONOMY

(a) Equitable Distribution of Resources

Equitable distribution of resources as well as equal opportunities for all is an important Constitutional issue. As resources such as land are discussed, it would be important to have this in mind.

There is also the issue of equity as between local units that constitute the whole, the problem of achieving balanced equitable development of the different areas of Uganda.¹⁴ The principle that the state should discriminate in favour of the least developed areas is welcome. What would not be welcome is for some areas to live off others. The least developed units should simply be facilitated to tap the resources that exist in their areas.

14 Article 214 of the Draft Constitution provides for grants in aid or subsidies to needy districts. The NRC in its debates has also recorded demands by several members for fair distribution of Development Projects, See New Vision July 21, 1994 - "NRC calls for fair share".

(b) Democratic Participation in Economic Decisions

I have pointed out elsewhere¹⁵ a potential for conflict between democracy and economic policies which are externally controlled; a conflict between the people's aspirations and the state's efforts to modernise the economy.¹⁶

We now know very well the pains of a dependent economy which is disoriented when the prices of export crops keep falling while the prices of imports keep rising and money has to be borrowed to be able to finance imports and cover budget deficits. In this situation Uganda, like several other African countries, has had to concede to the IMF – World Bank's tutelage of structural adjustment and stabilisation (SAAP).

The theory has it that the aim of SAAP is to cut down inflation, free resources from the public for investment in the private sector, while facilitating import of capital goods for growth. True there are visible signs of positive change out of the liberalisation that is part of the SAAP package, but the lot of the ordinary man cannot be said to have improved as a result. The peasant producer still earns little from the exported crops. Salaries and wages have remained low in relation to the prices of necessities.

If they were to be asked, it is most likely that the ordinary people would not point to any benefits they have derived from SAAP.

The relevance of this to the Constitution making is the need for democratic consultation and participation in economic decisions. Under the new Constitution, economic policies should not be matters of mere bilateral and multilateral agreements made between local bureaucrats and foreign organisations. In their views put to the Constitution Commission, many people were wondering why they were never told when government was going to borrow on their behalf and got to know only when the same government was explaining its inability to provide services because of big debts.

15 E.F Ssempebwa: *The Current Constitutional Debate in Africa* with particular reference to Uganda. (Paper delivered to a seminar on Culture and Democracy in Africa – Harare, Zimbabwe, September 1993).

16 Many Past Political Upheavals in the Developing World are attributed to unpopular economic policies dictated externally.

It is well known that even at the center, parliament rarely has the chance to discuss economic policies in detail. In the interest of stability all economic policies should be democratically discussed. What endangers the situation is not so much the policy pursued but the feeling that without adequate consultation, the government bows down to whatever conditions are imposed by lenders and donors.

In addition to the general prescriptions as to the policy to be pursued, the Constitution should provide for that democratic discussion.

The Draft Constitution attempts to depart from the past. It contains economic objectives which will guide the government and the people. Popular participation is a principle enshrined particularly in article 21(i) to the effect that:

“the state shall take all necessary steps to involve the people in the formulation and implementation of development policies and programmes affecting them.”

This stands among other declaration of objectives among which are that:

- (a) all development efforts shall be directed at ensuring maximum social, economic and cultural well being of the people.
- (b) the state shall encourage private initiative and self-reliance in order to facilitate rapid and equitable development.
- (c) the state shall provide equal opportunity for all citizens to develop themselves economically.

It remains to be seen how these guidelines will be articulated and interpreted when they are embodied in the new Constitution or how they will be given Constitutional form.

DEVELOPMENT FOR WHOM

The lack of democratic participation in the colonial period was not conducive to meaningful development. Even after independence, participation has been minimal, definitely absent during the years of military dictatorship. It is for this reason that this section is included.

Additional reason is the hindsight knowledge from the collapse of the Soviet Union. A world power collapsing to the reality of poverty is a lesson that there can be growth without development.

Development is man-centered whereas growth would be conceived to save the interest of the state machinery or of particular groups. If man is fully involved, there is no way that he can fail to be the target of the development.

CHAPTER III

A NEW CONSTITUTION IN UGANDA: SOME LIMITATIONS AND ISSUES

BY RICHARD OKUMU WENGI

INTRODUCTION

The National Resistance Movement (NRM) is credited with the historical feat of flagging off a Constitution making process involving the free will and participation of the people of Uganda having regard to the ideals of genuine democracy and the generation of a national consensus.¹ The task is herculean. This is because Uganda as a nation state, is only one century old in terms of the colonial design which sought to coalesce a cradleland of migrant ethnicities together into a colony in the 1890s. In anthropological terms the Ugandan polity emerges from the compression of Luo and Hamitic migrant frontlines onto a Bantu stock inside the Great Rift Valley. The emergent confrontations, negotiations, frustrations, assimilations, alienations collaborations and interactions over three or so pre-colonial centuries, predisposed the forged nation to great diversity. This diversity led to a complex society with a multitude of internal semi autonomous social fields each exerting great divergent force in competition with one another overlapping here and there and, presenting a chaotic tangle of amorphous societies. The creation of a state in this context was first of all necessary from the colonial point of view. But it was also necessary, as, the possibility of reversing a Luo or hamitic migration, for example, is excluded. Moreover, the existence of Uganda is a current reality tested in successive civil wars in which driving out “the enemy” beyond the border has been negated.²

1 Preamble to the Constituent Assembly Statute No.6 of 1993.

2 It has been argued that the popular rhetoric of “identifying the enemy” is reminiscent of this problem of alienation and Ugandans should through consensus learn to identify their friends as well.

The emergence of the colonial state however ignored the social fabric of the population and attempted to suppress the cultural pluralism, and practised differential treatment only where it benefitted the colonial design. The result was the sharpening of antagonism while at the same time stunting the autonomous growth of the wealth of cultures. The English Law was imposed and several Constitutional norms established in the form of ordinances and treaties with tribal groups and communities. The colonial grundnorm was enforced with brutality and customary laws either proscribed or granted recognition as if they needed or depended on colonial assent for their validity. But the plural cultures and customs persisted.

Negotiations for the independence Constitution itself took place in England from a draft Constitution prepared by English Constitutional experts. The outcome could hardly survive the social frictions at home. When in 1967, the then crisis Independence parliament converted itself into a Constituent Assembly and promulgated the 1967 Constitution, the outcome was to be overthrown hardly three years later. The self extended life of that parliament was cut short. Moreover, in 27 years, history has repeated itself and that same Constitution, is due for scrapping following a bush war launched in 1980 by 27 men.

It is with this background that we wish to discuss the Constitution making in Uganda on the eve of the 21st Century. It will become clear that there are difficulties to locate the real issues in any Constitutional exercise – the search for the grundnorm, in practical terms the search for the epicentre of power, the sovereign authority in Constitutional terms is a complicated issue. A review of the concurrent functional relationship as between the Constitutional making authority the CA, and the legislative authority of the National Resistance Council (NRC) in the search for the epicentre of power and the future Parliament is itself evidence of a certain degree of ambivalence. Can such ambivalence and its practical implications have any bearing on the essence of political pluralism in Uganda? Can one then examine the possibility of genuine pluralism in a movement paradigm or is this a type of political paranoia?

This discussion will indicate certain limitations, which are essential for the general understanding of the Constitutional scheme as it impacts on the status quo. For example, the existing Constitution and the Constituent Assembly Statute were altered by the NRC even before the CA debate began in spite of their serious consequences. Similarly the ban on political party activity itself has had far-reaching consequences.³ It is our humble desire to point out some of these issues in view of the fact that the executive state has always used a conspiratorial relationship with National Assemblies as happened in 1967 and 1990 to grant themselves extended control of the country. How can a written Constitution operate in a vacuum where there is no Constitutional antitrust mechanism or a known standard of legal ethic? How can legalism which has a core role in Constitutionalism be cultivated in such a situation?

As Jjuuko states:⁴

One must consistently and seriously respect legality. Because without it the exercise of state power becomes naked and arbitrary; one governs without authority and what was a healthy skepticism turns into a disdain for law and rights and subjects the latter to personal dictatorial manipulation. This erodes the legal ethic and thereby swings from insistence on legitimacy to an empty manipulative legality.

He cited some examples of the disdain for legalism:

For example, since 1986 the Uganda Constitution, a supposedly fundamental law has undergone no less than 10 amendments in not as many years. There has also been a lot of scorn towards the law in general and certain basic principles like the presumption of innocence. This lack of the legal ethic saps the legitimacy and undermines the authority of those who purport to govern. Hence on the one hand, at the highest level, a whole Vice President is appointed for a whole year without Constitutional authority and contrary to the law; external borrowing is illegally effected over and above the statutory ceiling. The law is then sought, as an afterthought and manipulated to legitimise retroactively the illegal activities. A thought is hardly given to the effect of the acts of a person illegally holding an assumed position.

3 The CA debates so far depict the tip of the iceberg. Can the polar opposites be reconciled?

4 Frederick W. Jjuuko: *The role of Law in Development: Prospects for Development in Uganda*. 1992 Uganda Law Society Review Vol. 1 No. 2 p. 150 at 154.

Uganda has gone through five major revolutions and hence Constitutional tremors and the sixth one is in the offing. The Constituent Assembly by necessary function will overthrow the 1967 Constitution. The movement in flagging off a major Constitution making exercise, will thus have begotten two legal orders in its contemporary lifespan: One by military action or revolution culminating in 1986, and the second by peaceful means. A third strain of action can also be discerned in the systematic enfeeblement of the unwanted 1967 Constitution and the progressive derogation since 1986 from its provisions through ordinary statutory action rendering it into a moribund legal order until eventual replacement. What are the immediate implications of this and how come that the movement, having contributed to the Constitutional disorder by a double strike and at its most recent manifestation, acquires the moral right to attempt to reorder this disorder? With what means and what success? These questions may become clearer as we proceed.

LEGAL NOTICES

The notoriety of legal notices in Uganda's politics and legal history cannot be over emphasised. By Legal Notice No. 1 of 1986 (hereinafter called the proclamation) the NRM declared the emergence of a new legal order. Paragraph 13 of the said proclamation provides:

- (i) Those provisions of the Constitution including Article 64 thereof, which are inconsistent with this Proclamation shall, to the extent of such inconsistency, be void.
- (ii) Subject to their Proclamation the operations of the Constitution and the existing laws shall not be affected by this Proclamation, but shall be construed with such modifications, qualifications and adaptations as are necessary to bring them in conformity with this Proclamation.

In the first place this proclamation was made by a power outside the Constitution as well as outside itself.⁵ The proclamation at once suppressed, through the process of suspension, the operation of certain articles of the 1967 Constitution.⁶ Superficially, the skeletal

⁵ See *Ssempebwa v Attorney General* Constitutional case No. 1 of 1986.

⁶ Articles 3, 36 and Caps IV and V save articles 24, 28, 34, 35 and 36. Vide paragraph 1 of Legal Notice No. 1 of 1986 as amended by Legal Notice (amendment) Statute 9 of 1989.

remains of that Constitution continued in force subject to an interpretative subrogation which exerted a voiding effect contained in the proviso to that article.⁷ It would appear that a suspension is no longer a temporary stay but is practically equivalent to the abolition of [parts of] a Constitution. But this has not been the case always, since, though suspended in 1971, the 1967 Constitution was wholly revived in 1979. But this time round we are encountering the abolition not only of the suspended articles but of the entire Constitution and the 1986 proclamation as well. This is the essence of the CA mandate the double duty of abolition and promulgation to conclude a series of events that began to unfold in 1986. Thus a whole Constitution, having been dismembered by proclamation, is due for total abrogation; after a period of partial abeyance and progressive disablement, the whole supreme law is prepared for a technical knock out. Then did the Constitution of 1967 fail to stand the test of time or was it choked by its in-built inadequacy; or was it simply killed and denied guardianship by the judiciary? Both these questions can be answered in the affirmative.

SUPREMACY OF THE CONSTITUTION

A debate has raged as to which of the two, the 1986 proclamation or the 1967 Constitution, is the source of the Supreme Law of the land. In the case of *Edward Ssempebwa v Attorney General*⁸ by a majority ruling the Constitutional court held that the Supreme Law consists of the new (1986) Legal order ushered in and comprised by the 1986 Proclamation and those parts of the Constitution, that were not suspended; that the two became fused to form a new legal order. Mr. Justice Wilson Kityo dissented and held the view that the Proclamation clearly relegated the 1967 Constitution, which thus became a secondary source of the Supreme Law. The most recent Constitutional court, the Kityo Court, subsequently upheld the dissenting opinion in the *Ssempebwa's case* and thus created two opposing positions relating to the Supreme Law of the Land.⁹ A resolution by the judicial intervention of the Supreme Court on

7 See paragraph 13(1) and (2) of the Proclamation.

8 *Ibid.*

9 *James Rwanyarare and ORS v Attorney General* Constitutional case No. 1 of 1994.

appeal is unlikely, rather the legislative promulgation of a new Constitution will extinguish the 1986 Proclamation as well as the 1967 Constitution.

Without animation, typified by the cockfight between the proclamation and the 1967 Constitution, it must be borne in mind that the current dichotomous position as well as the manner in which the matter will be reconciled, will cast a serious impact on the future of Constitutional rule in Uganda.¹⁰ But there is also another fundamental matter that characterises the initial decision to make a new Constitution. While in 1967 the contention was structural, namely, between the unitary and federal (kingdom) system, today the contention is between a single national political organisation versus the multiparty paradigm. The contest is centred on the measure of political association. While the former was structural the latter context touches the qualitative aspect of democratic freedom of the individual. If the 1967 scenario demanded a new Constitution, despite the superficial content of that revolution, how could the current situation be resolved without abrogation of the Constitution? It is our submission that the CA is an inevitable instrument and the statute establishing it as well as its mandate are all tailored to suit and execute that role.¹¹ This instrumentation from the sovereign pedestal of Constitution making will attempt to recreate a new order as well as a novel form in pluralism.

The significance of this can only be seen by analysing the relationship between the current NRC and the Constitution on the one hand, and the proposed Parliament vis-a-vis the proposed Constitution on the other hand. How will this Parliament operate say under the movement system and what will be the fate of the other interest groups and genuine political organisations? Will the new Constitution emerge as a Supreme Law or will a separate grundnorm detached from it exert sovereign power over the Constitution? The

10 The Kityo Court held that the Constitution is a secondary source of the Supreme Law of Uganda and a statute passed by the NRC could lawfully override the unsuspended Chapter 3 of the Constitution, on fundamental Rights. This, the court held, was because the NRC enacted the Law under the superior authority of the 1986 Proclamation. No appeal has been urged in this ruling.

11 A new Constitution altogether will replace the existing one, once the CA has put it in place.

current practice of legislating on Constitutional issues ahead of Constitution making, gives substantial ground to predict what the future might bring forth. It also casts a new feature in the nature of sovereign power in Uganda – outside the Constitution. Whether it be the ultimate concept of “the People” or not some examination might easily identify the same.

DUALISM

A look at the NRC created by the Proclamation indicates a dual capacity in the NRC as both the Supreme organ of government on the one hand, and the legislature on the other.¹² Thus the Proclamation provides for a subtle but discernible form of separation of powers. It is subtle in that the NRC doubles as both a Supreme collective executive and a legislature. The NRC, paradoxically exercises both that Supreme executive and legislative power when in its closed session or when meeting as a political organ.¹³

In this sense NRC approximates a sovereignty because no statutes have ever resulted from these fused meetings.¹⁴ In its legislative function, NRC is limited to passing statutes unless the President insists on issuing an ordinance.¹⁵ This function would appear to be restricted by the established lawmaking process. One limitation is the nominal regard that the Constitution is supreme. Article 1 of the Constitution provides that the Constitution shall be the Supreme Law and any other law inconsistent with it shall be void to the extent of such inconsistency. This article was not suspended by the 1986 Proclamation.¹⁶

But the issue of the Supremacy of the Constitution has not always been taken for granted. In the case of *Uganda v Alfred James Kasubi*¹⁷ the learned Justice Asthana held that the 1967 Constitution

12 See paragraphs 2-7 of the 1986 Proclamation.

13 Paragraphs 2(1) and 7(1) of the Proclamation.

14 It was suggested by Justice Tabaro, a member of the Kityo Court, that the NRC with the President sitting in it could be a sovereign, (during proceedings in *James Rwanyarare and ORS v Attorney General*).

15 Article 64 of the Constitution and paragraph 13(1) of the 1986 proclamation.

16 See Article 1 of the Proclamation.

17 (1975) HCB 173 Criminal Revision No. 342 of 1974.

was inferior to Amin's Proclamation for the correct reason that the wording in that Proclamation provided for the suspension of Article 1 of the Constitution. The 1986 Proclamation did not make this suspension and it would appear that the supremacy of the Constitution was expressly saved. But the position today is different in that the NRC appears to be able to override the Constitution through ordinary legislation or even through implications.¹⁸

But the NRM also exhibits a dual function. In the first place, is its historical role of taking over the power of government as spelt out in the preamble to the Proclamation. It played this role in the legal sense by slamming the proclamation and installing the NRC. In its second role, the NRM is a political association or more accurately an organisation. The Proclamation and the 1967 Constitution are in agreement in that the NRM is classifiable as an umbrella political association whose membership ostensibly conscripts the other political associations (parties) and encompasses the whole population jointly and severally.¹⁹ In seeing these two roles it must be kept in mind that an impact assessment shows that first and foremost NRM succumbed to legal form and secondly, it began to exhibit its political form in terms of a political association. The NRM further transformed its military wing, NRA, into a national army while its political arm gave rise to the RC system, which operates through a hierarchy of executives and councils which all got legal form.²⁰ It is also of considerable interest to note that in politically functional terms the reference to "political forces" and "political groups" in the proclamation prescribed an NRM commitment to pluralism in the form of allowing for the existence of forces and groups (in plural) only that it insists on their operation within the mandatory confines of the NRM itself.²¹ The suspension of political party activities itself presupposes this enforced assimilation by NRM of other or existing political associations to itself.²² The recent dissolution of UPM as a

18 The decision in the *Kasubi case* was not of a constitutional court.

19 Section 3 of Resistance Councils Statute No. 9 of 1987 makes every adult person in Uganda a member of the movement.

20 Paragraph 14 and 14A of the Proclamation and the various Resistance Councils Statutes. See also *Amos Mugisa v NRM Secretariat and ORS*.

21 Paragraph 2(iii)(a) of the Proclamation.

22 The expansion of NRC and RC elections have all been accomplished within the

distinct political association was consummated with the justification that the NRM as the umbrella organisation made UPM's existence superfluous.²³ No such "voluntary" dissolution has been heard of in any other political party. The CA is expected to bring about this result. The proposal for an interim five (5) year period under the movement system, in the DC, when endorsed by the CA will replicate the 1967 extension of Parliament and the 1990 extension of the NRC.²⁴

LEGAL PLURALISM

Looked at in a different perspective, there is another aspect in the occurrence of the plural expressions that occur in Chapter 3 of the 1967 Constitution and the pluralistic reference, earlier pointed out, to "political forces" and "political groups" in the Proclamation. The Constitution in that chapter guarantees the fundamental rights and freedoms to form political associations and trade unions and to receive and impart ideas as well as to hold political opinions.²⁵ The essential element here lies in the plural forms and content laying the basis for the argument that Uganda is not only a fundamentally pluralistic society but also exhibits legal pluralism in its grundnorm. The pluralism stipulated in the Constitution is qualitatively superior to the related provisions in the Proclamation. This is so because the Constitution concentrates on the content of pluralism whilst, it may be argued, that the Proclamation concedes to short term or military forms i.e. political forces, groups.²⁶ The more loose description of the form these associations take in the NRM paradigm is characteristic of the spontaneous formations and emergence of fragmented associations not only accommodating dissent but serving as the precedent prescribing the form that the so-called old political parties are required to succumb to.

ambit of 1(ii) and (iii) of the Proclamation.

23 The suppression of the UPM voice came in May 1994 when its leaders sought to elect 2 representatives to represent the party in the Constituent Assembly.

24 This issue has taken centre stage in the C.A debate with some delegates conceding to an inevitable extension of the present government but on an interim basis with coalition members not chosen for the various partners by the President.

25 Chapter 3 of the 1967 Constitution.

26 Paragraph 2 (iii)

The fact that the Proclamation did not suspend these provisions of the Constitution that do guarantee fundamental freedoms and rights can be said to have filled the qualitative gaps in the NRM scenario. But as time went on it is beginning to appear that this was not to be so. A derivative no party democracy has been experimented on where statutorily enforced associations have been put in place on the basis of residence, sex segregation, age set and so on. Thus elections have been staged for women, youth and others. It is our view that sex similarity or proximity among a dozen females cannot amount to free association in political terms. Positive discrimination apart, this cannot be a substitute to freedom of political association. Moreover, sex, age, etc., while having defined roles within autonomous social fields, are by themselves sterile in political legal terms. Similarly, divorcing persons from free organisation and pooling them into a movement can only approximate complementary democratic association but not the substitute or alternative one. The judicial uncertainty as to whether the Constitution is supreme in this country is the tell tale sign. Put another way, the question then becomes, apart from the initial impact in 1986 by which the Proclamation introduced a new legal order, has the epicentre of the Supreme Law not shifted away from the Constitution? What about the cumulative history of Legal Notices; does this haunt the Constitutional landscape of this country and assume the normative character of custom and Constitutional usage in 27 years?²⁷ This is a fundamental inquiry and any conclusion can only be vindicated by the future destiny of Constitutionalism in Uganda.

SUPREMACY OF THE LEGISLATURE

In the leading case of *Shah v Attorney General*²⁸ Sir Jeffrey Jones held that the Constitution defines the limits of the powers of the legislature, the executive and the judiciary. The Judiciary, he said, is immunised from political and legislative control. This position is more true in jurisdictions such as Uganda where there is a written Constitution unlike in Britain where Parliament exerts supremacy

27 The theory of customary constitutionalism is novel.

28 [1970] EA 523.

in a system without a written Constitution. Lord Diplock in *Hinds v The Queen* said:

The more recent Constitutions on the Westminster model unlike their earlier prototypes include a chapter dealing with fundamental rights and freedoms. The provisions of this chapter form part of the substantive law of the state and until amended by whatever special procedure as laid down in the Constitution for this purpose impose a fetter upon the exercise of the legislature, the executive and the judiciary of the plenitude of their respective powers.²⁹

J.B. Ojwang has described three major contrasts between the overall configuration of Kenya's Constitution and the British one and states that the most remarkable ones are:

- (i) [our] Constitution being documented in near exhaustive detail unlike the British one;
- (ii) the operation of [our] Constitution being profoundly influenced by the single party political system-unlike the two party system of Great Britain; and
- (iii) [our] apparent acceptance of the principle of judicial review of Parliamentary action that core concept of the American Constitution which, however, is firmly rejected by the British people.³⁰

Professor Ojwang's analysis may not have changed drastically since it is only recently that Kenya adopted a *de jure* multiparty system. In relation to Uganda, it can safely be stated that today we are a *de facto* and practically *de jure* single party state in so far as the umbrella movement system in practice bars political exertion by its supposedly component parts – the old parties. Suffice it to say that the decision of *Shahs case* and *East African Community v R*,³¹ were both 1970 decisions which were handed down in a situation of the single party system in all the three East African countries. In the *East African Community* case the Court of Appeal for Eastern Africa authoritatively held that the Constitution of Kenya was paramount and its validity could not be questioned in the courts

29 [1977] Ac 195 at 213 Letter E.

30 J.B. Ojwang: *Judicial Review of Parliamentary Action*, 1993, University of Nairobi, Law Journal No. 1 p.19.

31 [1970] EA 451.

of law unlike ordinary legislation which if inconsistent with the Constitution is void. On the contrary, the courts were the guardians of the Constitution.

Asthana J. considered the Uganda Constitution in the setting of the post 1971 coup in the case of *Uganda v Alfred James Kasubi*³². That case considered the following provision of Legal Notice No. 1 of 1971 in so far as it affected the Constitution.

8(1) Those provisions of the Constitution including Articles 1, 3 and 63 thereof which are inconsistent with this proclamation shall to the extent of such inconsistency be void.

(2) similar to paragraph 13(2) of the 1986 Proclamation.

The judge held that by virtue of Legal Notice No. 1 of 1971 above, article 1(1) of the 1967 Constitution was subject to any Decree in that any provision of the Constitution which was inconsistent with any Decree passed after that Proclamation was void. Thus in case of inconsistency, the Decree prevailed. In spite of this, but perhaps on account of it and further considering the paramount nature of the Constitution, the learned judge also found that article 71 of that Constitution dealing with the powers of the Director of Public Prosecutions (DPP) prevailed over any other law since this article had not been affected by any Decree.³³ This was a Criminal Revision by a single Judge but the authority of that case cannot be denigrated. It is important, however, to contrast the 1971 Legal Notice with the 1986 one. In the latter case, while article 1 of the Constitution is not suspended, in the former both articles 1 and 3 of the Constitution were subdued in favour of Decrees. But the picture becomes more interesting in that while article 3 of the Constitution was suspended, its dual effect, namely, the positive power of alteration of the Constitution, and the fetters imposed on the method of such amendment were both voided. The resultant vacuum thus exists not only in the disentanglement of parts of the Constitution but in the absence of the positive power of alteration of the Constitution.

32 *Ibid.*

33 Accordingly if there was anything in any other Law which was inconsistent with the powers of the DPP under Article 71, the Article prevailed to the extent of such inconsistency.

This vacuum has in practice been filled by legislative usurpation of powers of alteration by the NRC invoking the provisions of paragraph 7 of the 1986 Proclamation.³⁴ It would also appear that the saving of article 1 supremacy of the Constitution is uncertain in light of the fact that the NRC has exercised alteration powers over the Constitution although by specific legislation. Can we then say that the Constitution including the one to be promulgated shall reign Supreme? This can be answered by considering the trends towards enacting Parliamentary sovereignty in the NRC and future Parliaments created in its image. But first let us briefly look at this doctrine.

PARLIAMENTARY SOVEREIGNTY

Exhuming Chief Justice Cokes authority in *Dr. Bonhans case*, one sees that the doctrine of Parliamentary sovereignty also sprang from the womb of the English common law. Coke stated thus:

The Common Law will control Acts of Parliament and sometimes adjudge them to be utterly void for when an Act of Parliament is against common right and reason or repugnant or impossible to be performed, the Common Law will control it and adjudge such Act to be void.³⁵

Even today in New Zealand³⁶ it has been held that an Act of Parliament may not for instance legislate compulsion by torture as this cannot be within the lawful orders of Parliament as some common law rights presumably lie so deep that even Parliament could not override them. The state of Israel, which has no bill of rights nevertheless has also embraced a jurisprudence of judicially protected Constitutional rights.³⁷ Justice Brennan has asserted, in his essay “Courts, Democracy and the Law” that no doctrine of sovereignty precludes judicial review. He asserted that:

34 The justification is that the vacuum created by deletion of the power to alter the Constitution (besides the manner of doing so) has to be filled. The question is, how? In our view this should have been accomplished by an amendment statute amending the 1986 Legal Notice No. 1 restoring the positive power to alter the Constitution.

35 [1612] 77 ER 646 at 652.

36 *Taylor v New Zealand poultry Board* (1984) INZLR 394.

37 See Justice Brennan, Commonwealth Law Bulletin (1991) Vol.17 No. 2 at 702.

To the contrary the doctrine of Legislative Supremacy requires the courts to determine whether any exercise of executive power falls within parliament grant ... it would be a cautionary reflection for any government that was minded (to exclude the courts) should they come into opposition the precedent that they set might rob them of the Laws protection.³⁸

According to Professor Wade³⁹ the sovereignty of Parliament in Britain exerts a powerful influence as a peculiar feature of that country's unwritten Constitution. He describes the phenomenon in terms of its menacing effect over the judge's cautionary response towards the executive which effectively controls Parliament in that country.

The Sovereign legal power in the United Kingdom lies in the Queen in Parliament acting by Act of Parliament. An Act of Parliament requires the assent of the Queen, the House of Lords and the House of Commons ... This is the one and only form of sovereign legislation and there is no limit to its legal efficacy ... sovereign legislation owes its validity to no superior authority: the courts accept it in its own right. Furthermore no Act passed under the Parliament Acts can prolong the life of Parliament beyond five years whereas the power of a sovereign Act is boundless ... But his legal paramountacy can be exercised only by an Act of the Sovereign Parliament.⁴⁰

The above authoritative statement provides an important landmark when we are considering the power of the present NRC. It has been suggested that the NRC is a Sovereign Organ of state in the manner of the Sovereign legal power of the United Kingdom. This has been alluded to in particular reference to the presence of the Chairman/President in the NRC when in session closed or otherwise and or when NRC sits as a political organ. This would have been so but for the fact that this mutant form of NRC does not express itself by statute. For example the decision on the suspension or abolition of political parties (in any case suspension may not necessarily indicate an interim measure) was taken without it being reduced into a statute. According to the 1986 proclamation when the NRC

38 Op.cit.

39 Prof. Wade: Administrative Law 1982 Fifty Edition Oxford P. 26.

40 Op.cit.

is acting as a Supreme authority its composition should exclude cabinet Ministers, Deputy and Assistant Ministers who only join in when NRC is a legislature.⁴¹ This provision separating the legislature from the Supreme authority of the NRC tends to rule out the contention that NRC can pass a Sovereign Statute.

Reacting to the Sovereignty of Parliament the British Courts have been able, through interpretation, to keep Parliament in check. Professor Wade has summarised it thus:

In doing so (the courts) draw upon strong traditions of long standing and upon their own prestige and with these resources they can do much. Some of their bold decisions ---- in recent years show that they need not be deterred by the weakness of their Constitutional status. Even under the British system of undiluted Sovereignty the last word on any question of law rests with the courts.⁴²

He went on to predict a move towards protection of at least the fundamental rights by special Constitutional status that would make them proof against repeal by legislation of the ordinary kind. It was suggested that Judges be required to subscribe to a special or extraordinary judicial oath requiring them to uphold the fundamental rights against inconsistent legislation.

A LIVING CONSTITUTION?

The history of Constitutionalism in Uganda can be characterised, as asserted by a member of the Kityo court, in terms of Constitutional instability. In that instance the Judge sought to find the justification for the derogation of fundamental rights by the state. The 1967 Constitution permitted such derogations if the same was necessary in the interest of Public Order.

The authorities, including Professor Kanyeihamba⁴³ defined Public Order to only cover situations of emergency, the breakdown of economic order and natural disasters. Kanyeihamba includes wars, internal insurrections, industrial strikes and so on as other instances

41 Paragraph 2(ii)f.

42 *Ibid.* p. 29.

43 Constitutional Law and Government in Uganda and see Ghai & McAuslan: *Public Law and Political change in Kenya*, 1970, Oxford University Press, p.435.

that drive governments to resort to extraordinary legislation that affect fundamental rights. The idea of a past history of Constitutional instability being another ground to justify curtailing fundamental rights is a mind boggling innovative jurisprudence enunciated in the Kityo court. Be it as it may, the fact of Constitutional instability in Uganda, cannot be wished away provided there continues to exist an artificial or forced Constitution tailored to canonise a dictatorship. This trend can easily be discerned, if one examines all the past Constitutional processes including the recent urge to re-write the Constitution. It becomes clear that nation building in the form of systematic centralism that does not take cognisance of existing fundamental and plural forces, at play particularly the numerous semi-autonomous societies constituting the Ugandan polity, will not achieve the genuine consensus and democracy that is needed. Similarly the dream of a Constitution that will stand the test of time cannot be approximated unless the country adopts a living Constitution in the context of a living law. Such a Constitution must in content reflect the continuously variable autonomy of the plural social fields existing in Uganda. The static urge to impose a Constitution that does not provide for free political organisation and competition will result in a normative and Constitutional vacuum between the state and the subjects. The institution of the state that should reside within the living sovereign law will become progressively alienated leading to more Constitutional instability.

The above scenario can be examined in light of experience of coups, civil wars, liberation wars and ethnic cleansing that is ravaging the African continent many times threatening the integrity of African states. The emergency in Somalia, Burundi, Rwanda, Zaire, Sudan, and Kenya among others is symptomatic of the type of danger that can result from Constitutional inadequacy and extreme centralism when the artificial state operates without a living Constitution. A discussion of such a Constitution is outside the purview of this paper but suffice it to say that in making a new Constitution, opportunity will be lost to make a living Constitution, if the exercise is merely one of political engineering not based on empirical considerations. By passing oneself as having “consulted” people in the Constitution making process alone, autochthonous legitimacy is not harnessed.

Further to this, even a purely juristic endorsement of any legal process which is inimical to the fundamental rights and empirical pluralism can only result in limited legitimacy. The inevitable reward to the Executive state is power without glory.

In light of the foregoing therefore, the solemn purpose of the Constituent Assembly must proceed from the informed position that recognises the empirical fabric of Uganda. Shrewd legal engineering that may constitute the CA into an interim National Assembly will sap the moral authority of the CA and the Constitution. Similarly, pre-emptive amendments by the NRC of the CA statute in the meantime would introduce into the new Constitution a sense of the unethical and widen the current vacuum created by lack of any anti-trust process. Likewise any intolerance between extreme social hegemonies that may sneak into the new Constitution will only sharpen the confrontation and negate the future of Constitutionalism in this country.

One may even be tempted to maintain skepticism as to the genesis of the DC. According to Justice Odoki, the Chairman of the Constitution Commission, slightly over 15,000 memoranda were received. Of these over 12,000 (i.e. over 80%) of the memoranda were generated from Resistance Committees.⁴⁴ The RCs are a hybrid civic organisation whose membership is based on residence status. But it is also the cell stage of the NRM. It is correct to state that RCs, do not, in political organisational terms, qualify as interest groups or political associations in a pluralist society. Their memoranda therefore can at best be the primary memoranda of the NRM. Here then lies a fundamental limitation to the DC. Moreover, in his maiden address to the CA, the Minister in charge of Constitution making is reported as having accused the Constitution Commission, of inserting in the DC matters that were extraneous to the collected views and memoranda. Could then the CA cure this defect by using the Bulgarian experience to craft a workable Constitution?

44 Justice B. J. Odoki: *The current Constitution making Process in Uganda*. (1992) *Uganda Law Society Review*, Vol. No. 2 93 at 100.

CONCLUSION

It has been said that democracy grows best on the fertile ground of a strong economy, a large middle class and a supportive civic culture. Pridham has asserted that:

Plural groups insulate the masses and elites from direct relations and Mediate conflict, educating citizens of the virtues of tolerance and accommodation. Strong competing political parties aid the transition from authoritarianism and totalitarianism, help to organise public discourse, and deliver the political goods once the debate is complete.⁴⁵

This dynamic scenario has recently been replayed in Bulgaria where transition to democracy has been largely attributed to careful political crafting. Professor Albert Melone has stated that leading elements of the former discredited regime in Bulgaria were able to join with their fledgling opponents and created a democratic Constitution after a painstaking process of accommodation, negotiation and compromise at national round table talks leading to successful restructuring. The Communist Party of Bulgaria conceded to co-existence but insisted on a set of rules that would guarantee the creation of democratic institutions that stressed pluralism, political competition and legalism through a court structure designed to protect human rights.⁴⁶

Whatever the merits of comparison between Bulgaria and Uganda many issues emerge. The two after all have had numerous close trade deals in recent years. The continuation of the Communist Party in Bulgaria was legitimated by the round table talks in a manner that has been described as wolves in sheep clothing.⁴⁷ Attempts at alienation of the Turkish factor in the Constitutional talks that threatened to undermine the level of consensus, exacerbating the underlying tension were resolved when the Bulgarian Court ruled

45 Pridham Geoffrey ed. (1990) *Securing Democracy: Political Parties and Democratic Consolidation in Southern Europe*, Routledge.

46 Albert P. Melone, Professor of Political Science, Southern Illinois University at Carbonandale USA 1993: *Bulgaria's National Round Table Talks and the Politics of Accommodation: Creating the conditions for a Peaceful Transition to a Democratic Constitutional System*. Paper prepared for the Interim meeting of the International Political Science Association Research Committee on Comparative Judicial Studies, St. Johns College, Sana Fe New Mexico, August, 1993.

47 Albert P. Melone *Ibid*.

in favour of the rights of the Turkish Party to take part in elections despite a ban on political parties based on ethnic, racial or religious lines.

Eventually, Bulgaria managed to craft a democracy, albeit fragile, by creating institutions including the energised courts that “have had an autonomous influence on subsequent political relations ... shaping the manner and nature of political discourse and coaxing civil society into a stable and vigorous existence”⁴⁸.

Melone found that in the Bulgarian experience, about fifty different quasi-political organisations, such as workers unions, social democratic Party, victims of repression, Human Rights groups, civic movement, Freedom of conscience and spiritual values, etc., formed an umbrella organisation the Union of Democratic forces to contend with the Communist Party monolith. No doubt their authenticity was challenged until through mass rallies they demonstrated it. But their main achievement was to vindicate the thesis that political-actor centred micro-analysis may be an important key to understanding transitional politics.⁴⁹

Turning to the Ugandan situation, one sees the pyramidal centralism in the NRM system representing an inescapable greenhouse where political parties and other competing forms of association are not only de-emphasised and discouraged but suspended. This is clear from the so-called suspension of political party activities. More so, elections on political party basis is criminalised. This has been true of the NRC, RC, and CA elections. Only politically sterile associations based on gender (women), age-set (youth) etc are deliberately espoused. The UPC old party has particularly been discredited through one of the most effective lobby systems in Africa. But the emergence of a new nation-wide movement for Multi-party Advocates seems to be gaining momentum in a manner marked by calculated disparagements and defections. The scene is set in the CA triangular table whose edges must be decisively trimmed into a more oval frame so to speak.

48 *Ibid.*

49 *Ibid.*

The Constitution writing process which presents the opportunity and the mechanism for the extension of the NRM for a further five years, seems to include elements of plural forces despite the suspension of political party activities. It is safe to assert, that the official umbrella movement (NRM) will achieve an extension; but if this is done by 70% vote out of which 20% will have voiced pluralist sentiments outside the NRM or in terms of independent interests in an NRM coalition with other forces, the new Constitution must be able to accommodate those “minority” positions and develop them into rights. But these competing interests must be espoused through an alternative umbrella movement or through the concerted efforts of the different organisations acting in harmony.

This is essential in order to achieve a truly peaceful change of government as well as a peaceful transition to democracy.

CHAPTER IV

CITIZENSHIP - A TEST FOR DEMOCRACY IN UGANDA

By FREDERICK W. JJUUKO

INTRODUCTION

Within the broad context of Uganda's history in general and also in the context of the Constitution making process the issue of citizenship has not only provoked drastic action and impassioned debate but it also raises serious issues about democracy in Uganda in terms of the past and its prospects.

The history of Uganda clearly shows that some relationship exists between various aspects of citizenship on the one hand, and democracy, or rather the absence of democracy, on the other. As the German experience with Nazism shows, the absence of democracy, with the associated economic and general social crisis, feed into xenophobia and racism; and in their turn xenophobia and racism promote dictatorship. This relentless spiral, implacably saps the basis for a democratic culture and can explode into what is currently known as ethnic cleansing. Certain aspects of citizenship issues in Uganda hold potential for this scenario, especially in the context of global and African developments relating to the state.

THE NATIONAL STATE

This latter aspect adds urgency to the debate. All over the world one witnesses the breakdown and disintegration of many states, accompanied by a more inward looking attitude. The ethnic cleansing proceeding in former Yugoslavia, and in many parts of Africa are part of this process.

In Africa, where the national state is increasingly in question, where the business of "national building" began by the colonialists seems to be coming to an end and, where national agendas have

ceased to exist there is groping for new solutions, new contexts in which to see, freedom, democracy and independence and social progress. The breakdown of the national states here does not seem to lead directly and immediately to an internationalist, or even Pan-Africanist perspective of things on the old basis of federating existing units. And although we are increasingly being sucked into global living, the increasingly porous borders and state ineffectiveness do not lead directly to a more global viewpoint.

Instead there is what appears to be a process of fragmentation, reConstitution, an inward looking process towards a cultural fundamentalism in which ethnic consciousness of 'tribe', clan etc. are quite apparent. Because, the economic crisis deepens and wipes away the material basis for democracy; as the agricultural economies are outstripped and undermined by fundamental historical processes and the peasantry and the middle class lose their base, there is a shift from formal to the informal economy, from state to non-governmental organisations, from the big to the small; from the central to the local; and from the more recent and artificial social and economic institutions to the older natural units.

The current democratisation process in Africa and in Uganda tends to gloss over this process. The nationalist is stunned into paralysis when that democratisation suddenly lays bare this process; parties assume ethnic traits, countries are riven into two or more divisions. Suddenly the nationalist sees the old certainties—a clear national agenda leading to a national democratic revolution and a national state; nationalisation and the control of the “commanding heights of the economy” leading to a national economy, all pursued fervently with a single-minded single-party with a single ideology, and even a single national dress thrown in for good measure, and all dissent a subversion and desecration and betrayal of the national crusade to be kept away in detention without trial—are all thrown in doubt and not even remotely achievable. Almost spontaneously the people are seeking radically new solutions to the old problems even as a neo-classical colonialism creeps back into place.

It is in this context that the old problem of citizenship assumes a new significance in Uganda. This context makes it imperative that the matter be handled in a most straightforward and candid manner.

CITIZENSHIP

The concept of citizenship connotes a legal status of an individual natural person in the context of the state. This context of the state then defines the rights (and duties) of such person. Thus although citizenship need not coincide with residence or even domicile it is nevertheless an important legal category since for the majority of the citizenry, citizenship in fact goes with domicile and residence; but above all the whole concept of human rights, even though stated in universal terms has been historically presumed to be in the context of the state and made these rights in reality citizens' rights. This fact was more aptly expressed in the French Declaration of *Droit de l'homme et du citoyen*, a position which we have hardly developed from within both municipal and even international law systems. This implies that depriving citizens of rights either because persons are stateless or refugees or owing to any other limiting factor detracts fundamentally from their human rights.

THE NATURE OF THE PROBLEM IN UGANDA

In Uganda there are a host of problems associated with citizenship. The first is historical, tied up with the very inception of Uganda whose creation had less to do with demographic, social, cultural, ethnic or political consideration of the African people living in the region then, than with the interests often rivalling, of the colonising powers. This resulted in the brutal slicing of peoples by international borders that created new contrary political units.

To some extent in spite of Uganda's existence for a hundred years now, the resistance to colonialism resulting in the preservation of a number of cultural, social and even economic forms by the Africans themselves coupled with the deliberate presentation by imperialism itself of these economic and political forms for purposes of exploitation of cheap labour and the imposition of indirect rule, these international borders failed to be of enduring meaning to the populations that had been violated by the colonisation process and helped to make the borders porous, the concept of citizenship to pale before the more concrete ethnic identities. In such places, citizenship became problematic to some extent at the level of

ascertainment. Together with this is the fact those borders remained ambulatory until their final settlement in 1926. And the fact that under colonial oppression citizens' rights were not realisable the whole idea of citizenship was denuded of any concreteness that it might otherwise have had.

The second problem associated with citizenship in Uganda has been the question of refugees who have streamed into Uganda over the decades. This is also an aspect of the 'national building' project that went awry in the neighbouring countries. Over the years, refugees have streamed into Uganda from the four cardinal points, especially from Rwanda in 1959 and from Sudan in 1956 until 1960. But Uganda has also received significant although intermittent flows from Zaire and more recently Kenya.

This second aspect is the one that has proved most problematic and has had the highest profile. With it is associated the problem of people who have practically become stateless. In this regard, especially in the case of Rwandese nationals, as the problem extended over four decades, straddling over three generations, it also resulted in a crisis of identity both at the collective level and ranged from attempts at integration with varying degrees of success and failure. The recent invasion of Rwanda by the RPF would seem to indicate by insistence on their Rwandese citizenship that there has also been ambivalence depending on circumstances and other practicalities.

The problem has been further compounded by the drawing of these refugees into Uganda national politics, including the alleged participation of these refugees in pogroms and other atrocities perpetrated by security organs, especially during the Amin regime and more recently their participation in — depending on one's political stand — the struggle against dictatorship or the engaging in treasonous and subversive rebellion and levying war against a legitimate and elected government during the 1980s. This has inevitably dragged for better or worse the issue of these refugees into the vortex of the (often petty and unprincipled) national politics of Uganda, a perennial and central problem of which is the issue of democracy.

The third major problem associated with citizenship is the manner in which Ugandans, but more precisely various Ugandan

governments have treated non-nationals whether the latter have been refugees or not.

In this regard non-nationals have been mistreated, expelled and even brutalised. In this connection non-nationals, being a most vulnerable group, have been the victims of the neo-colonial political and economic crises which have been externalised in a petty way to turn them into scapegoats.

This trend began in the 1960s when the neo-colonial economy began to experience the inevitable crisis that the economic policies pursued hitherto entailed. As this crisis grew so did the civilian dictatorship and in 1969 this resulted into the expulsion of Kenyan immigrants who over the years when national borders meant little, especially within the context of East Africa, had drifted to wherever opportunity lay regardless of the borders. These Kenyan nationals who worked in industry, police and other sectors of the economy were bussed out of the country. The question of the economy, as well as of democracy were left outstanding and were to explode into a military takeover only two years later.

The wrath subsequently visited on Ugandan nationals of Asian extraction in 1972, on ethnic Rwandese in the early 1980s and, in a sense, also the invasion of Tanzania in 1978 by either governments or state organs or functionaries at various levels all typically happened at the height of dictatorships and political and economic crises. And in all these cases these attempts at the “externalisation” of the problem did not resolve the underlying crises which in fact only became worse.

There are other problems, additional to the above, associated with citizenship. These include, the unequal treatment of men and women in regard to the naturalisation of their spouses, the integrity of the administration of the naturalisation process, especially with regard to accusations of non-nationals playing a role in it, as well as the issue of dual citizenship.

THE CITIZENSHIP DEBATE

There have been various responses by Ugandans and non-Ugandans to these issues. Some have been expressed in submissions to the

Constitutional Commission and others have been expressed in the media in response to the Constitutional debate in which various political groups participated.

There are concerns reflected in the Report of the Constitutional Commission about non-citizens. There are also concerns about the level of their participation in affairs of state in Uganda including the government and particularly the army culminating in charges of the domination of the government by non-nationals and thereby compromising the national interests as well as sovereignty.

Reactions to these concerns have been mixed. In many cases they have lost track of the basic issues. One argument has been to typify all concerns about non-citizens as xenophobic and thereby dismissing the matter out of hand. This is not only erroneous because it ignores genuine problems, that are bred by the question of non-citizens, but, compounds the problem, by removing it from the arena of democratic discussion, leaving the turf to demagogues, who will some day, stoke the fires into a disastrous conflagration. Such attitude only postpones the issue.

A similar position expressed in the recent debate is one of 'historical absolutists' who tend to throw out the baby with the bath water. In this connection it has been argued, in effect, that there are no Ugandans, or no indigenous Ugandans at any rate, because the ancestry of all present Ugandans migrated to this place at some point in history. The disregard of African history by the colonialists who drew up the colonial borders is also cited in support of this position.

A variation on this argument, but looking to the future rather than the past for inspiration is the 'internationalist' argument. This urges not only the de-emphasis of national boundaries and identities in favour of regional and Pan-Africanist solidarity efforts at the freeing of Africans but also cites stints of various individuals in other countries' liberation efforts as a justification for ignoring the factor of the nationality of persons in the politics of a country.

An even more interesting twist to this argument was the point made in the papers comparing the undoubted existence of "good foreigners" on the one hand and 'brutal Ugandans' on the other. The

point being made was of course more subtle than this. Nevertheless this and the other arguments are not adequate answers to the demand by Ugandans to have nationals run the affairs of the country. Nor would they be an adequate response to demagogic and xenophobic incitement of Ugandans against non-Ugandans. In the first place borders were never meant to be dividing lines between good (on this side) and evil (across the border). Nor are they meant to put an end to regional and international cooperation and solidarity.

The correct point made about non-nationals is their divided loyalty or allegiance potential or otherwise. Hence even if it were the case, for example, that members of the RPF participated in the 'liberation' of Uganda their participation as well as interest in the country are only provisional. Their struggle as well as interest in Uganda then becomes only a tactical phase in their strategic bid to return to their homeland. The compromises they may make, the support they may, render or any other actions they may take are premised on this basic fact. Indeed with even the best of intentions, they may for example, support a dictatorship and subvert democracy. Their being 'good' therefore becomes largely irrelevant and incidental to this crucial consideration. In such circumstances the demand by the people, whose stake in Uganda is primary and more enduring and unconditional, is that they are entitled to the exclusive determination of the fate of their country or at least, to determine the levels at which, and, on what conditions, such non-nationals may participate in the political life of the country. Such a demand is valid but is not a judgement on their political 'goodness' either. There is nothing xenophobic or chauvinistic about such a position.

Non-nationals are normally restricted in participation in the political life of states, amongst other things. That national politics is practised largely in the context of the present state system which places a high premium on reciprocity and state protection of nationals. Internationalist solidarity and movements only truly have meaning outside this formal system rather than for example, in the context of the Pan-Africanism of states. Although there is a lot of interaction and interweaving between the formal national politics and internationalism the exclusion of non-nationals from the former should not therefore necessarily detract from internationalism.

THE CONSTITUTIONAL COMMISSION'S RECOMMENDATIONS

The Constitutional Commission attempted to answer many of the issues concerning citizenship, coming out with a number of recommendations. In regard to one of the basic categories of citizenship, the Commission recommended "Every person born in Uganda whose parents or grandparents, are or were, members of any of the indigenous communities, living within the borders of Uganda as of 1 February 1926, and, the offsprings thereof". This reference which points to the year 1926 and to indigenous communities has caused some dispute. The date relates to the time when the present boundaries of Uganda were finally determined. Article 7(1) of the 1962 Constitution had instead referred to "a person who was born in Uganda and who on the 8 October 1962 was a citizen of the United Kingdom or its colonies or a British protected person, provided one or both the parents of the person had been born in Uganda".

Although it may be said that the definition suggested by the Commission appears to create more certainty and concreteness and to create no substantial difference from the provisions of the 1962 Constitution it has been regarded with some suspicion, a matter we shall return to later on. The Commission has also recommended the rejection of dual citizenship, citing statistically significant views expressing concerns about the divided loyalty of such citizens, which becomes a serious problem in the case of hostilities or national crisis since such citizens are seen as compromised and as citizens of convenience; and also fears of domination and compromise of sovereignty by persons holding dual citizenship. The Commission Report devoted some space on the issue of refugees. It spelled out people's concerns about refugees which it categorised as legal, political, economic and relating to land. These were spelt out in detail as follows:

- (a) The legal concerns are mainly on the definition of refugees being too wide, thereby making any meaningful control of numbers of refugees impossible.
- (b) The political concerns are principally directed against past regimes which from 1971 started to recruit non-Ugandans in the army and in other security services, offer them political posts and high positions in the Civil Service.

- (c) The economic concerns are based on the scarcity of employment opportunities in Uganda. In such situation people expect preference to be given to Uganda citizens in allocation of jobs and other economic opportunities.
- (d) The concerns on land has been voiced by the people in those areas where large settlements of refugees have existed since the late 1950s. The ever-increasing numbers of refugees in these settlements and the increase of their cattle has resulted in land encroachments and constant friction between refugees and local residents.

The Commission Report also notes that the Uganda government faced with four options regarding a lasting solution to refugees especially those from Rwanda identified voluntary repatriation to the country of origin as the best and proceeded to encourage it. The other three options viz, the naturalisation of refugees on application, repatriation to another country and “blanket” or “omnibus” naturalisation, through automatic grant of citizenship to all refugees, as it was done in Tanzania were not taken lip.

The Commission then reports that the majority of the views submitted to them support grant of citizenship on application to those refugees who have stayed in Uganda for a minimum of 20 years. It is on this basis that the Commission recommends that refugees who have lived in Uganda for a minimum of 20 years and wish to become Ugandan citizens just like persons who have legally and voluntarily migrated to Uganda and have continually lived there for the same period, should on application be granted citizenship. Such persons on being registered as citizens should renounce the citizenship of their country of origin and take a public oath of allegiance to Uganda. The Commission recommends that for the smooth and efficient implementation of this process the non-citizens should register with RC 1 and RC2 and may require recommendation at that level; and the exercise should be efficiently undertaken within one year after the commencement of the Constitution. The Commission also takes a .. liberal position on persons who have illegally acquired citizenship. It recommends an amnesty for a specific period for such persons, so that they be not prosecuted and are given a ,chance to properly re-apply for citizenship, The Commission sets out .the

conditions for obtaining citizenship by registration requiring a minimum age of 18 years, a minimum continual residence of 5 years in Uganda, language qualifications and such disqualifications as the perpetration of treason. Procedurally it requires recommendations by RCs and an oath of allegiance. For the proper administration of this process the Commission recommends the establishment of the National Citizenship and Immigration Board whose members are to be appointed by the President. Lastly, the Commission makes a recommendation for the education of people to desist from considering and suspecting Uganda citizens to be foreigners and from making derogatory remarks to that effect. This is aimed at eliminating the “attitude among some Ugandans which marginalises Ugandan citizens who live at the borders and share a cultural heritage with tribes across the borders”. The Commission reaffirms positively that “Ugandans of Rwandese origin and culture have the same right to the language and culture within Uganda as any other indigenous tribe In Uganda”.

The strongest point to be made about the Commission’s work with regard to the issue of citizenship is not so much any specific recommendation, although no doubt many of these have a lot of merit, as the attempt to bring the issue of citizenship within the ambit of open and democratic discussion. The specific recommendations will go a long way into resolving the problems of citizenship to the extent that they represent this debate and the views freely expressed by the population. The Commission highlights the plight of refugees, especially those generations that have been born here and are practically stateless. Since Uganda strictly does not have the category of citizenship by birth, the proposal to register refugees who have stayed in Uganda for at least 20 years is a sound solution to this problem. By eschewing the “blanket” or “automatic” grant of citizenship it also addresses the concerns of Ugandans about divided loyalty, domination by non-nationals or dual citizens, etc. Such issues have ceased to be theoretical since October 1990 when it became clear that many refugees, including those who had identified and conducted themselves as Uganda nationals made a bid to return to their homeland. The Commission’s position as accepted by Ugandans will enable these refugees to make a conscious exclusive

choice of nationality that, other things being equal, should resolve the problem in a long-term manner.

The proposed streamlining of the administration of matters relating to the registration and deregistration of citizens, the issuance of passports and national identity cards and Immigration by the creation of the National Citizenship and Immigration Board requires a thorough discussion. The acceptability of the results of its work such as the national identity cards and even certain categories of citizens and therefore the resolution of many teething issues relating to citizenship will depend a great deal on its integrity, which in turn will depend on, amongst other things, its composition and appointment. In this respect Parliament may have to ratify Presidential appointments. This point is central to the problem of citizenship given the suspicion expressed about malpractices in regard to registration, issue, of passports in the past, as well as the arbitrary deprivation of citizenship. In the past by intolerant regimes,

With regard to the issue of Ugandans “who live at the borders” and share a cultural heritage with tribes across the borders” there is really no problem of citizenship as such and legally at least this is totally a non-issue. In reality this is a problem of dictatorship in Uganda and is intimately linked with reciprocal ethnic politics practiced by every regime in Uganda and the tendency to externalise our problems in a petty way. The prospects of a reversal of this trend appear dim going by political developments. It is a problem of democracy and essentially not one of ignorance about the facts of the matter. Hence “education” as proposed by the Commission is not a solution to this problem – at any rate if this education is to play a role it must be in the context of the democratisation of Uganda. This kind of problem cannot be resolved by any amount of information about or proof of citizenship and would certainly not be resolved by the issuance of National Identity Cards; just as it is not resolved today for such citizens who presently hold passports.

PROSPECTS

It is necessary to try to resolve the problems of citizenship in Uganda. This is urgent because in the context of the present fundamental economic crisis, xenophobia and racism and the possibilities of

present day Auschwitzs are growing. The ethnic cleansing erupting around the globe is a clear indication of this threat. Cultural revivalism and fundamentalism – a more inward- looking search for solutions to the disintegrating “national” states could even be hijacked for this purpose. It is important to note, in trying to resolve the issues surrounding citizenship, that the fears of domination should always be qualified with the reality that no group ethnic or national or any African foreigners are able in the present circumstances, to impose their domination in the manner and to the extent Western imperialism has done for the past century. Above everything else the prospects for the resolution of the problems of citizenship lie in an open and democratic discussion of the issues by Ugandans. The proposals by the Constitutional Commission can have meaning only in this context. Indeed this is the tenor of the very proposals of the Commission relating to citizenship in as much as they make constant reference to the “views of the people” their concerns and to statistical preponderance of submissions on any given issue.

In this regard it should be noted that there is hardly any issue more sensitive, and one requiring the conscious consent and concurrence of the population for its long term solution than the issue of citizenship.

That is why it is imperative that the discussion of this issue remains unhampered by either manipulation or criminal prosecutions or threats of such prosecutions. A conscious effort should be made to desist from criminalising political activity, especially in the context of constitutional debate, not only because this also has the eventual adverse effect of politicising criminal justice but because in curtailing debate on citizenship it will cast doubt on whatever result is reached, making it provisional and only postponing the explosion to another day. For the sake of those who suffer adversely from the problems of citizenship the situation should not be created where it will be said that there is a new category of “citizenship by intimidation, in addition to that by birth, descent and naturalization because a section of the population felt intimidated out of the debate. In particular the law of sedition is unsuitable in the context of this political debate. It is a law that was invented by the absolute monarchs in England. These monarchs were not created through a democratic process

and could not be democratically challenged in any way so that any challenge to them had to be regarded as seditious or treasonous. The so called sectarianism law appears in this context.

This is the kind of law that the Star Chamber Court so brutally enforced. The idea was to suppress all ideas that the state regarded as threatening its security; it was not aimed at falsehoods. Indeed the more truthful a seditious statement was, the greater the punishment. With liberal democracy both sedition and treason were outmoded and were only introduced in the colonies to suppress the anti-colonial movement. They are so against the grain of the times and so contrary to the democratic spirit that their activation requires careful consideration and therefore, unlike most other offences, require the prior consent of the Director of Public Prosecutions. Laws of this type should not be brought into the crucial constitutional debate; and in particular on the issue on citizenship.

CHAPTER V

SOME ASPECTS OF FUNDAMENTAL HUMAN RIGHTS

BY GRACE TUMWINE MUKUBWA

THE PURPOSE OF A WRITTEN CONSTITUTION

The most lucid exposition of the purposes of a written constitution was laid down in 1803 by the American Supreme Court in the famous case of *Marbury v Madison*.¹ The court was answering the question whether an Act which is repugnant to the constitution can become law of the land. In answering this question the court said that the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their happiness. The exercise of the original right is a very great exertion which may not and ought not to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is Supreme and can seldom act, they are designed to be permanent.

This original and supreme will organises the government and assigns to its different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments. It may be pointed out here that Uganda's constitution and the Draft constitution (DC) are of the latter type. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. The purpose of having a written constitution is that the limits it contains must not be passed by those intended to be restrained. The constitution controls any legislative Act repugnant to it. All those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation and 'consequently the theory of every such government must be that an act of Parliament which is repugnant to the constitution is void.

1 1 Cranch 137 (1803).

In other words it is not law. These principles have been adopted in the East African constitutional jurisprudence through the case of *E.A.C v Republic*.² Similarly these principles influenced the Draft Constitution. The Uganda Constitutional Commission has the following statements in one of their reports.

People are deeply concerned about abuse of power and want mechanisms to check it.³

... the principle that the people are sovereign must form the bed-rock for political, economic and social life of the country.⁴

It is necessary that the constitution is supreme over all government authority...⁵

The commission also accepted the principle of separation of powers as a means of controlling tyranny because the concentration of power in one individual or organ of the state tends to be corrupting and to result in dictatorship. One solution, the commission concluded, was to demarcate state organs and define their powers so that each organ keeps check upon and balances the other; the organs being the executive the legislature and the judiciary.⁶ There are detailed provisions regarding these organs. In Articles 1 and 2, the DC provides for the supremacy of the constitution and the sovereignty of the people. In Chapters 5 it entrenches a Bill of Rights under the title of Fundamental Rights and Freedoms.

RATIONALE FOR BILLS OF RIGHTS

Protection of basic human rights is one of the principal pillars of democracy which must be widely accepted. The basic human rights to be protected are freedom of speech; expression and of the press; freedom of assembly and association, right to equal 'protection of the law; right to due process and fair trial; and freedom of religion.⁷

2 *East African Community v Republic* (1970) E.A.

3 The Report of the Uganda Constitutional Commission: Analysis and Recommendations UPPC Entebbe 1993 para. 5.34.

4 *Ibid* para 5.42.

5 *Ibid* para 5.44.

6 *Ibid* para 5.56 to 5.58.

7 Derek Muhwezi New Vision Tuesday 22 February 1994.

The word freedom is more difficult to define than the word right. Freedom can primarily be characterised by the absence of coercion or constraints.⁸ If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of a bill of rights is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction; coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and restraint and the right to manifest beliefs and practices. *Freedom means that, subject to such limitations as are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.*

Basically the protection afforded to the individual by the Bills of Rights is against contraventions of those rights and freedoms by the state or some other public authority endowed by law with coercive powers, and, not by another private individual. The Bill of Rights in the constitution does not deal with purely private wrongs.⁹ The provision of a chapter on human rights in the constitution “imposes a fetter on the exercise by the legislature, the executive and the judiciary of the plenitude of their respective powers.”¹⁰ Derek Muhwezi says that the pillars of democracy in a democratic society’ are; the I sovereignty of the people; government based on the consent of the governed; majority rule, free and fair elections; constitutional limits on government; social, economic and political pluralism; due process of the law; equality before the law and guarantee of basic human rights.

All Bills of Rights are predicated on a particular conception of the place of the individual in society. An individual is not a

8 *R. v Big M. Drug Mart Ltd* (1985) 1 S C R 295 AT 336–337 also *Allan Singer Ltd v Attorney General*, Quebec (1988) 2 scr 790 at 813

9 *Maharaj v Attorney General of Trinidad and Tobago* No.2 (1979) A.C. 385 at 396 (P.C), *Thornhill v Attorney General* (1990) 2WLR 510 at 516 (P.C).

10 *Hinds v The Queen* (1977) A.C 195 at 213 (P.C) and *Thornhill v Attorney General Supra* at p.519.

totally independent entity disconnected from the society in which he or she lives. Nor, however, is the individual a mere cog in the impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The Bills of Rights must reflect this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control. Thus, the right guaranteed in the constitution erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass.

The Bill of Rights and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity.¹¹ Professor Neil McCormic¹² regards liberty as a condition of human self-respect and that of contentment which resides in the ability to pursue one's own conception of a full and rewarding life.

To be able to decide what to do and how to do it, to carry out one's own decisions and accept their consequences are essential to one's self-respect as a human being and essential to the possibility of that contentment. He believes that such self-respect and contentment are goods for human beings, the worth of life itself being on condition of having and striving for them. And if a person were deliberately denied the opportunity of self-respect and that contentment, he would suffer deprivation of his essential humanity.

This clearly is the philosophy behind the American First Amendment and Section 2 of the Canadian Charter of Rights and Freedoms and Article 51 of the Draft Constitution.

The American First Amendment states:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for redress of grievances.

Section 2(a) of the Canadian Charter states:

Everyone has the following fundamental freedoms:

(a) freedom, of conscience and religion;

11 See R. Morgentaler (1988) 1 SCR 30 at 164-165.

12 Neil Macneil: *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* 1982 quoted in *R. v Morgentaler. Ibid.*

- (b) freedom of thought, belief, opinion and expression including freedom of the press and other media of communication.
- (c) Freedom of peaceful assembly; and
- (d) freedom of association.

The DC vide Article 51 states:-

51(1) Every person in Uganda shall enjoy the fundamental rights and freedoms of the individual, namely the right to each and all the following:

- (a) Life, liberty, dignity, education, culture, security of the persons, fair hearing and protection of the law;
- (b) freedom of conscience, creed or religion, expression, the press, assembly, association and movement;
- (c) protection of the privacy of the person, home, family, correspondence, communication and property;
- (d) protection from slavery and forced labour;
- (e) protection from deprivation of property without compensation; and
- (f) other rights and freedom enshrined in this chapter.

(2) In the enjoyment of the rights and freedoms prescribed in this chapter, no person shall prejudice the rights and freedoms of others or the public interest.

It can be seen that apart from the DC containing a long list of rights and freedoms, there is not much difference between it and section 2 of the Canadian Charter and the American First Amendment in terms of the underlying philosophical principles. Commenting on the American First Amendment and section 2(a) of the Canadian Charter, Dickson J. said:

What unites enunciated freedoms in the American First Amendment and section 2(a) of the Charter and in the provisions of other human rights documents in which they are associated is the notion of the centrality of the individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation. In *Hunter v Southam inc. Supra* the purpose of the charter was identified ... as the unremitting protection of the individual rights and liberties. It is easy to see the relationship between respect for individual

conscience and the valuation of human dignity that motivates such unremitting protection.

It should also be noted, however, that an emphasis on individual conscience and individual judgement also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability and efficacy of our system of government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that the American jurisprudence has emphasised the primacy of The first amendment. It is this same centrality that underlies their designation as fundamental. They are the *sine qua non* of the political tradition underlying the charter.¹³

Similar sentiments were expressed by Wilson J.:

The idea of human dignity finds expression in almost every right and freedom guaranteed in the charter. Individuals are afforded the right to choose their own religion, and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation [they will pursue. These are all examples of the basic theory underlying the charter, namely that the state will respect choices made by individuals and to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.¹⁴

After commenting that an aspect of human dignity on which the charter is based is the right to make fundamental personal decisions without interference from the state and that such right is critical to liberty and that it grants the individual a degree of autonomy in making decisions of fundamental personal importance, he concluded by saying:

I believe that the framers of the constitution in guaranteeing “liberty” as a fundamental value in a free and democratic society had in mind the freedom of the individual to –develop and realise his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric – to be his own person and accountable as such.

13 *R. v Big M. Drug Mart Ltd.* *Supra* at p. 345.

14 *R. v Morgentaler.* *Supra* at 164–165.

...We should be free so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it.

Each is the proper guardian of his own health- whether bodily or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest.

Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them.¹⁵

The summary of these views is that the state is restrained by the Bill of Rights from imposing on its citizens its view and only its view of what is right in an attempt to mould their thoughts and behaviour. It is submitted the philosophy contained in the above statements applies with equal force to chapter 5 of the DC as evidenced by the debate on whether or not to include all the rights contained in the various international Bills of Rights.¹⁶

DEROGATION OF HUMAN RIGHTS PROVISIONS

The debate still rages on whether the guaranteed rights should be absolute or should admit certain reasonable and necessary exceptions. The legitimate criticism of the current and previous Uganda constitutions was that the protected rights were hedged with so many exceptions that the protected rights were illusory. It is not surprising that the constitutional commission was faced with the delicate decision of whether the protected rights should be expressed in absolute terms and leave the interpretation to the courts or whether there should be exceptions if only to guide interpretation. The commission opted for the latter.¹⁷ But it basically adopted the overriding limitation to “circumstances prescribed by law and acceptable in a free and democratic society”. The other words and phrases used are “prejudice to the rights and freedoms of others”, “public interest”, “national interest” and “execution of a sentence of court prescribed by law”. What is not clear is why

15 *Ibid.*

16 See *Supra* Note 32 ut para 7.99-7.103.

17 *Ibid.*

the U.C.C decided to put the exceptions on each article thereby making the chapter unnecessarily long and cumbersome to read. Moreover it seems, as will be seen later, the commission was pre-occupied with saving many of the existing laws, which is also the main reason for so many exceptions in the 1967 constitution. Be that as it may, it is important to look more closely at the main justification for derogation which is “circumstances prescribed by law and acceptable in a free and democratic society”. The phrase “shown not to be reasonably justifiable in a democratic society” also appears in the 1967 constitution in, for example, Article 14(2) (d). A similar provision in the constitution of Zambia 1964 that the rights therein were subject to the exception “except so far as the provision in question or as the case may be, anything, done under the authority thereof is shown not to be reasonably justifiable in a free and democratic society”. Also section 1 of the Canadian Charter states that the freedoms guaranteed are “subject only to such reasonable Limits prescribed by law as can be demonstrably justified in a free and democratic society”.

WHAT IS A DEMOCRATIC SOCIETY?

The difficulty of defining a democratic society was clearly realised in a leading Zambian constitutional reference.¹⁸ The judge was commenting on the submission of the Attorney General that when a court applies the test of what is reasonably required in Zambia, then so long as Zambia continues to be a democracy, that which is reasonably required in Zambia must be reasonably justified in a democratic society. He said:

I think the difficulty and indeed the obscurity of the expression has somewhat encouraged this approach. I rather suspect that the constitutional draftsman in eluded the expression more for its emotional effect than with any real regard to what it means. However it is there and has to be given a meaning.¹⁹

Then he went on to say:

I think it is necessary to adopt the objective test of what is reasonably justifiable, not in a particular democratic society, but in any democratic

18 *J.U. Patel v Attorney General* Constitutional Ref. 1 of 1968 unreported.

19 *Ibid.* p. 36.

society, I accept the argument that some distinction should be made between a developed society and one which is still developing, but I think one must be able to say that there are certain minima which must be found in any society, developed or otherwise, below which it cannot go and still be entitled to be considered a democratic society.²⁰

The learned judge went on to adopt the statement in two American cases which attempted to define a democratic country and one Indian case which defined a democratic organisation. In one such case, a democratic country was defined to mean:

a free society in which government is based upon the consent of all informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities.²¹

And in another one where it was defined to mean:

a free government – one that leaves the way wide open to favour, discuss, advocate or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us” or as Voltaire put it “J disapprove of what you say, but I will defend to rite death your right to say it.”²²

In the Indian case he cited with approval the following statement:

Freedom of speech and of the press lay at the foundation of democratic organisation for, without free political discussion, 110 public education so essential for the proper functioning of the process of popular government is possible.²³

Dickson C.J of the Canadian Supreme Court said of the equivalent phraseology in the Canadian Charter:

A second contextual element of interpretation of section 1 is provided by the words “free and democratic society”. Inclusion of these words as the final standard of justification for limits all rights and freedoms refers the court to the very purpose for which the charter was originally entrenched in the constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society, which I believe

20 *Ibid.*

21 *Ibid.* p.37 adopting *Speiser v Randerl* (1958) 357 US 513.

22 *Ibid.* p. 37 adopting *Yates v U.S* (1958) 354 U.S 298 at 344.

23 *Ibid* p. 37-8 adopting *Romesh Thupper v State of Madras* (1950) SCR 594.

embody, to name but a few, respect for inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the charter and the ultimate standard against which a limit on right or freedom must be shown despite its effect, to be reasonable and demonstrably justified.²⁴

The U.C.C²⁵ accepted that the fundamental rights and freedoms are by nature universal and believed that Uganda needed to recognise the entire International am of Rights. It does not need much logic to reach the conclusion that the international charters were adopted together with their philosophical underpinnings viz the centrality of the individual and his ability or right and freedom to make decisions affecting him without much interference from the state and its organs. Moreover the commission accepted the principle that the government has a duty to promote and protect these rights and must be liable for their breach by government or its agents.²⁶

In view of the above it only seems prudent that the state should not be trapped with so many vague exceptions by purporting to act under which it may infringe the protected rights. One general provision along the lines of section 1 of the Canadian charter would appear to be all that is needed. That section provides:

The Canadian charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to the limits prescribed by law as can be demonstrably justified in a free and democratic society.

By so doing the constitution would import or receive important precedents to guide its interpretation. For example though stated in simple terms the courts have already ruled that the limits in the section include:

Limitations as are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.²⁷

24 The Queen Oakes (1987) LRC (const) 477 at 498-499.

25 Op.cit note 3 para 7.100 to 7.102.

26 *Ibid* para 7.89 and article 75(1) of the DC.

27 *R. v Big M Drug Mart Supra* at p. 337. *Imperial Tobacco Ltd v Attorney General* (Canada) unreported p. 70.

But not every act that would fall under, say “the limits necessary to protect public safety or order” will automatically override the guaranteed rights. First where the limitation is invoked for the purposes of justifying a violation of the constitutional rights and freedoms chapter 5 was designed to protect a very high degree of probability will be commensurate with the occasion.²⁸ So where evidence is required to prove the derogation, such evidence should be cogent and persuasive and make clear to the court the consequences of imposing or not imposing the limit.²⁹ The court except where certain elements are obvious and self-evident, must know what alternative measures for implementing the objective were available to the legislators when they made the decisions.³⁰

Secondly to establish that the limit is reasonable and ‘demonstrably justifiable’ (or as the Draft puts it “necessary in a free and democratic society” or “acceptable in a democratic society”) two central criteria must be satisfied.

First the objective which the measures responsible for a limit of a [charter] right or freedom must be of sufficient importance To warrant overriding a constitutionally protected right or freedom. The standard must be high in order to ensure that objectives which are trivial or discordant with principles integral to a free and democratic society do not gain protection. It is necessary, at a minimum, that all objective relates to concerns which are pressing and substantial in a freedom democratic society before it can be characterised as sufficiently important.³¹

Secondly once a sufficiently significant objective is recognised, then the party invoking (The justification) must show that the means chosen are reasonable and ‘demonstrably’ justified. This involves a form of proportionality test.³²

Although the form of proportionality test will vary depending on the circumstances, in each case courts will be required to balance the

28 *Law Society of upper Canada v Skapinker* (1984) 1 SCR 357 at 384. *Re. Singh and Minister of Employment and Immigration* (1985) 1 SCR 177 at 217, *The Queen v Oakes Supra* at p. 500.

29 *The Queen v Oakes Supra* p. 500.

30 *Ibid*, see also *R v Big M. Drug Mart Ltd. Supra* at 352.

31 *The Queen v Oakes Supra* at p. 503.

32 *The Queen v Oakes Supra* at p. 499.

interests of society with those of the individuals and groups. There are three important components of proportionality test. First the measures adopted must be carefully designed to achieve cite objective in question. They must not be arbitrary, unfair or based on irrational consideration. In short they must he rationally connected to the objective. Secondly, the means even if rationally connected to the objective in the first sense should impair as little as possible the right or freedom in question. Thirdly, there must be proportionality between the effects of the measures which are responsible for limiting the right or freedom and the objective which has been identified as of sufficient importance.³³

The court ended the discussion of these tests by making very important observations:

Some limits on rights and freedoms protected will be more serious than others in terms (of the nature of the right or freedom violated, The extent of the violation and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance and the first two elements of the proportionality Test are satisfied, it is still possible that, because of the severity or the deleterious effects of the measure on individuals or groups, the measure will not be justified by the purpose it is intended to serve. The more severe the deleterious effects of the measure the more important the objective must be if the measure is to be reasonable and demonstrably justified ill a free and democratic society.³⁴

It is submitted that despite using other verbal variations of the phrase, the above passages give a sufficient expose of the standards to be applied in justifying derogations from the protected rights. It must also be borne in mind that the onus of proving that a limit on a right or freedom guaranteed by the constitution is reasonable and justified (acceptable) in a democratic society rests upon the party seeking to uphold the limitations.³⁵

33 *Maharaj v Attorney General of Trinidad and Tobago* (No.2)(1979) A.C. 385 at p.385 at p. 388, and *Attorney General v Antigua Times* (1976) AC 16.

34 *Kemrajih Harrikissonn v Attorney General of Trinidad and Tobago* (1980) AC 265 at 268, *Thronhill v A.A. Trinidad and Tobago* (1982) 2WLR 510.

35 *Maharaj v Attorney General of Trinidad and Tobago* (0.2) *Supra* at 396.

ENFORCEMENT OF FUNDAMENTAL RIGHTS

The declaration of protected rights in the constitution must be accompanied by sufficient and efficient means of protecting them. The Uganda Constitutional Commission has accepted the obvious that a written constitution is the supreme law of the land and that any law which is inconsistent with it shall be void.³⁶ It must also be accepted that it is the province and the duty of the judiciary to say what the law is. And only the courts can say authoritatively when a law is contrary to the constitution. Similarly by accepting and endorsing the doctrine of separation of powers the court is given a supervisory role both on the executive and the legislature. So in cases where an individual complains that his rights are, have been or will be infringed by the executive or the legislature he must be able to go to court for redress.

Under the existing constitution this remedy was provided under Article 22 which provides in part, so far as is relevant, that:

- (1) ... If any person alleges that any of the provisions of Article 8 to 20 inclusive (i.e. Fundamental Rights and Freedoms Articles) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter that is lawfully available, that person may apply to the High Court for redress.
- (2) The High Court ... may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the said articles...

Similar provisions to this appear in the constitutions of Jamaica, Guyana, Kenya, Antigua and Trinidad and Tobago. For example section 6 of the constitution of Trinidad and Tobago provides:

For removal of doubts it is hereby declared that if any person alleges that any of the provisions of the foregoing sections or sections of the constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.

36 *Op. cit* Note 3 para 5:44.

The similarity in wording is not surprising because these various constitutions borrowed the provisions from Article 5(5) of the European Convention on Human Rights.³⁷ When commenting on the above provisions the privy Council said:

The right to apply to the High Court under section 6 ... for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedom;...³⁸

And that the remedy ‘redress’ co-exists with any other remedy to which the victim may be entitled.³⁹ The remedy was directed against:

Contravention of those rights or freedoms by the state or some other public authority endowed by law with coercive powers.⁴⁰

It was also held that the word ‘redress in its context bore its ordinary meaning of reparations or compensation including being a preserve of the constitutional court with a right to appeal to the Supreme Court. The reason for this has been said to be the need for consistency.⁴¹ However this procedure makes enforcement of fundamental rights and freedoms cumbersome, lengthy and expensive. Consistency is not a valid reason now that there is a Supreme Court, to restrict the interpretation of the constitution in that manner. The reasons given by the U.C.C do not go beyond the need for consistency.⁴²

There is a need to define the term ‘person’, ‘individual’ and ‘law’ for purposes of chapter 5 rights and freedoms. It is suggested that the word person should be defined to include “anybody of persons corporate or unincorporated”. It should also be made clear that the word ‘individual’ includes a ‘corporation’ and bodies incorporate where the context permits. This would mean that the word individual would mean ‘any legal person who is not the general public’. Law should be defined to include ‘acts of parliament for the time being in force in Uganda and any law enacted by parliament after coming into force of the constitution.

37 *Maharaj v Attorney General of Trinidad and Tobago Supra* at 396.

38 *Ibid.*

39 *Ibid.*

40 *Maharaj v Attorney General of Trinidad and Tobago Supra.*

41 See note 3 *Supra* paras 17.97-17-91 and chap 28 see the discussion post pp-

42 C.F Kenya Constitution s.123.

SPECIFIC RIGHTS

In interpreting the chapter protecting fundamental rights and freedoms one must start off with the purpose of the right or freedom. In other words the meaning of a right or freedom guaranteed must be ascertained by an analysis of the purposes of such guarantee; that is in the light of the interests it was meant to protect. This has to be done by reference to the character and the larger objects of the chapter on rights and freedoms itself. The language used should articulate the specific right and freedom with which it is associated within the context of the chapter.⁴³ It is with these considerations in mind that I will comment on some of the important rights in the Draft Constitution.

RESPECT FOR HUMAN DIGNITY

This is contained in Article 54 of the DC and is stated in absolute terms. “No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment”.

In other words this is a total and unqualified prohibition. This is an improvement on the existing constitution which had a clawback to this right. The U.C.C must have been persuaded by the convention against torture which says that.

No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency may be invoked as a justification of torture.⁴⁴

Even the defence of superior orders may not be used to justify torture, cruel, inhuman or degrading treatment or punishment. However, for the realisation of this right one must also look at the “due process” provisions in Articles 53, 58 and 72 of the DC.

43 *The Queen v Big M. Mart Ltd. Supra* at 364.

44 Convention Against Torture and other Cruel inhuman or degrading Treatment or Punishment. Resolution 39/46 or 10 December 1984 Article 2(2). The convention came into effect on 20 June 1987.

RIGHT TO A FAIR TRIAL

The issue of the right to a fair trial has been elaborated in a series of cases the most important of which was *Miranda*⁴⁵ where certain procedural rules were laid down. A fair trial can be achieved only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will. In order to permit a full opportunity to exercise the privilege against self incrimination, the accused must be effectively told of his rights and the exercise of those rights must be honoured.

At the outset if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has a right to remain silent. The warning of the right to remain silent must be accompanied by an explanation that anything said will be used against the individual in court. The right to have a lawyer present at the interrogation is indispensable and the accused must be so informed. If he is indigent he should have counsel appointed for him especially in serious cases. If during the interrogation or prior to it he indicates that he wishes to remain silent, the interrogation must stop. The fact of a lengthy interrogation or incommunicado incarceration before a statement is made should be made a rebuttable presumption that the statement is not voluntary.

FREEDOM OF EXPRESSION AND ASSEMBLY

Freedom of expression has been elaborated on by numerous cases based on the American first amendment, which states in part:

Congress shall make no law abridging the freedom of speech or of the press.

This freedom is only subject to restrictions required in order to protect the state from destruction or from serious injury, political, economic or moral⁴⁶ and that the necessity which is essential to a valid restriction does not exist unless speech would produce or is intended to produce a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent.⁴⁷ It has been

45 *Miranda v Arizona* 384 U.S 436 (1966).

46 *Whitney v California* 274 U.S. 357 (1927).

47 *Schenek v United States* 249 U.S 47 at 52.

said that the right to receive information and idea is fundamental to a free society.⁴⁸

The underlying purpose of protecting speech is the fear of nurturing dictatorship. Thus Justice Jackson said:

Struggles to coerce uniformity of sentiment in support of some end though essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial, or territorial security, support of a dynasty or regime and particular plans for saving souls. As first and moderate methods to attain unity have failed those bent on its accomplishment must resort to ever increasing severity Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the grave yard.⁴⁹

And later on in the judgement the court said:

If there is any fixed star in our constitutional constellation it is that no official, high or petty can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.⁵⁰

Even the language used is not a justification for restricting freedom of speech as Justice O'Connor said:

As a general matter we have indicated that in public debate (our citizens) must tolerate insulting, and even outrageous speech in order to provide 'breathing space' to the freedoms protected⁵¹

The philosophical underpinnings of protecting these freedoms were stated by Brandies J. who first stated that:

The right of free speech, the right to teach, and the right of assembly are, of course, fundamental rights.⁵²

He gave the justification for protecting these freedoms. First is the belief that the final end of the state is to make people free to develop

48 *Stanley v Georgia* 394 U.S. 557 (1969).

49 *West Virginia State Board of Education v Burnette* section 19. U.S. 624 (1948).

50 *Ibid.*

51 *Boos v Harry* 485 U.S. 312 (1988).

52 *Whitney v California* 274 U.S. 357 (1927).

their faculties and that in its government deliberative forces should prevail over the arbitrary. Secondly people value liberty both as an end and as a means. Liberty is the secret of happiness. It is the belief that people should think as they will and speak as they think is the only way to discover and spread the truth; and that:

Without Free speech and assembly discussion would be futile; with them, discussion affords ordinarily adequate protection against dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty and that this should be a fundamental principle of government. They recognised the risks to which all human institutions are subject. But they knell' that order cannot be secured merely through fear of punishment for its infractions; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law.⁵³

For the above reasons the limitations on the freedom of speech and the press contained in Article 59(3) of the DC should be reconsidered. From a horde of cases the justification for the freedom of press is as follows. Freedom of the press is supposed to protect the citizen against abuse of authority in a modern state. The cases assert that the administration of government has become more complex and the opportunities for malfeasance and corruption have multiplied. The rate of crime has grown to most serious proportions and so has the danger of its protection by unfaithful and corrupt officials. This has led to the impairment of the fundamental security of life and property by criminal alliance and official neglect. Consequently these developments clearly emphasise the primary need of the vigilant and courageous press. The fact that the freedom of the press may be abused by miscreant purveyors of scandal is not a sufficient reason to qualify the immunity of the press from previous restraint in dealing with official misconduct.

Another equally important reason for protecting freedom of the press is to prohibit the widespread practice of government suppression of embarrassing information. Secrecy in government is fundamentally anti-democratic and perpetuates bureaucratic errors.

It is therefore hard not to accept the proposition that open debate and discussion of public issues are vital to any nation's health and body politics. Consequently on public questions there should be unlimited, robust and wide open debate. Public interest is not served by secrecy. On the contrary public interest is served by avoiding secrecy for its own sake. Because if everything is classified, then nothing is classified.

As a result the system becomes one to be disregarded by the cynical or the careless and to be manipulated by those intent on self-protection or self-promotion. Accordingly public interest in a democratic society would better be served by the maximum, possible disclosure, recognising that secrecy can better be preserved only when credibility is truly maintained.

The above arguments do not mean that the law should not deal with those who abuse the freedom of the press. The law recognises that some degree of abuse is inseparable from the proper use of everything and this is more so in the press. Erroneous statements are inevitable in free debate. It may well be that such open debates on public issues may include vehement caustic and sometimes unpleasantly sharp attacks on government and public officials. Then the question is whether the press forfeits the protection by the falsity of its factual statements and by its alleged defamation of officials.

There is no recognised exception for any test of truth. The constitutional protection should not and does not turn upon the truth, popularity or social utility of the ideas and beliefs which are offered. But if the press publishes or broadcasts something and by so doing violates the law it may be subjected to *subsequent punishment* under the civil remedy of defamation.

In short one can say that the freedom of speech, assembly and association are triplet brothers and are intended to be for the benefit of the governed and not the rulers.

FREEDOM OF ASSOCIATION

It was said in one Indian case that the exercise of fundamental rights like freedom of association:

.... cannot be made subject to the discretionary control of administrative or executive authority which call grant or withhold permission to exercise such right at its discretion. It is equally well established that there cannot be any restriction on the exercise of such right which consists ill previous restraint on such exercise and which is in the nature of administrative censorship. The guaranteed freedom cannot be abridged or abrogated by the exercise of official discretion.⁵⁴

As D. Muhwezi has said governments are there to protect basic human rights but not grant basic human rights as has long been the trend in Africa.⁵⁵ There is no doubt that is what the U.C.C had in mind in providing in Article 12 of the DC that:

Fundamental rights and freedoms of the individuals and groups are inherent and flat granted by the Slate.

In doing this the commission was actually saying what the courts had already said before. For example on commenting on Chapter 4 of the constitution of Ghana, which was word for word like Uganda's existing constitution, the court said:

J would say That I am not prepared to treat fundamental rights as a coronation oath to be applied only by the grace of the courts and to be enjoyed as a bounty from some authority. They are rights inherent in the people(s) as human beings and Cannot be derogated from by the law.⁵⁶

The enunciation of the right to freedom of association means a citizen's right to form, to join, not join or resign from an association.⁵⁷ However, it is too obvious for debate that fundamental rights are not

54 *Ramakrishnaiah v The President, District Court, Nellore AIR 1952 Madras 252* quoted with approval in *Gunaratne v Peoples Bank* (1987) LTC Const. 383 at 391-2.

55 New Vision. Tuesday, 22 February 1994 p. 14.

56 *Osei v Republic* (1971) GLR 1.

57 *Dewan Ungandan Nigeri Kelantan and another v Nordin bin Salleh and another* (1992) 1 Malayan Law Journal 697.

absolute.⁵⁸ An analysis of American and Indian cases where the issue has been much litigated shews that:

the curtailment of freedom of association arose ill situations where The action involved was either criminal, such as The advocacy of revolution, rebellion or violence or (lie incitement thereof, so as to bring it within the tests that the courts have formulated as constituting a danger to the state and society. It generally involved both sensitivity of job and threat to the state and society.⁵⁹

The right of association is of great value and has a varied scope. It embraces associations which are political, social, economic and includes such entities as clubs and societies.⁶⁰ Even family relationships are based on this fundamental right to associate⁶¹ and is therefore connected to the fundamental right to privacy.

Therefore, as John E. Novak and J.E. Young have said:

this right cannot be limited by the government unless the limitation serves a governmental interest unrelated to the suppression of ideas and this governmental interest cannot be furthered through means which are significantly less restrictive of the associational or expressive freedom: in other words, the regulation of association must be narrowly tailored to promote an end that is unrelated to suppressing the message which will be advanced by the association because of government disapproval of its purposes.⁶²

It is for the above reasons that Articles 135 sub-articles (h) and (i) may be difficult to implement. These provide:

A Member of Parliament shall vacate his seat in parliament... (h) if he leaves the party for which he stood as a candidate for his election to join another party or seeks to remain in Parliament as an independent member; (i) if he was elected as a member of parliament as an independent candidate and joins a political party.

58 *Dewan Ungandan Nigeri and another v Nordin bin Salleh and another Supra. Imperial Tobacco Ltd v A.G of Canada Supra* p. 58 *R. v Oakes Supra* pp 135- 140.

59 *Gunaratne v Peoples Bank Supra* p. 391.

60 *Gunaratne v Peoples Bank Supra* p. 395.

61 *Loving v Virginia* 388 U.S. 1.

62 J.E. Novak and J.N. Young *Constitutional Law* 3rd Ed. Horuhook series p. 948.

These provisions are in conflict with protection of freedom of association contained in Articles 51(i)(b) and 59(i)(e). It has been held that in construing a constitutional document it is axiomatic that the highest motives and the best of intentions were not enough to displace constitutional obstacles. Whenever legally permissible the presumption must be to incline the scales of justice on the side of the fundamental rights guaranteed by the constitution, enjoying as they do, precedence and primacy.⁶³ It is contended that any provision in the constitution at variance with the chapter on fundamental human rights must give way to the latter.

RIGHT TO LIFE

Invariably the discussion of the right to life revolves around the issue of capital punishment. The U.C.C made recommendations to retain the death penalty. It is said that capital punishment should be retained in the new constitution for extremely serious crimes namely murder, treason, aggravated robbery and kidnapping with intent to murder. It was also recommended that capital punishment should be in the discretion of the courts to decide whether a conviction for any of those crimes deserves the maximum penalty of death or life imprisonment. In other words that the death penalty should not be mandatory. However the commission admits that “the debate on abolition of capital punishment did not receive substantial submissions”. Accordingly it recommended that maintaining the death penalty should be regularly reviewed through national and public debates to discover whether or not the views of the people have changed to support its abolition. This author has had occasion to say:

The death penalty is an inhuman and degrading form of punishment which contrary to the barbaric theories of punishment neither deters political violence or crime. It hurts more the people that were not a party to the crime such as spouses, children and close relatives. Particularly for children it remains a permanent scar always feeling morally guilty for what they did not do or can't understand. Moreover a death penalty once carried out can never be reversed. Yet we know so many cases where people have been wrongly convicted or convicted

on fabricated evidence. It does not make sense for a state, for example, to teach people that killing is bad by itself killing. There is no evidence of increase in crime where capital punishment has been abolished.⁶⁴

Some of these concerns were also voiced by views presented to the U.C.C in support of abolition of capital punishment. The arguments were as follows:⁶⁵

- (a) Capital punishment has never served as a deterrent in any country. A potential murderer will go ahead whether or not capital punishment is maintained.
- (b) The death penalty is seen as remnant of the old philosophy of “eye for an eye” such justice which was popular in pre-modern societies can no longer be subscribed to by a modern state.
- (c) The death penalty is not only cruel as a punishment but also makes human life cheap. Some have referred to it as pre-mediated murder by the state. Once the state is given such power to destroy human life, it may tend to disregard the lives of its citizens.
- (d) The death penalty helps no one. It cannot be said to be advantageous to the state or the family which has lost a person or the criminal who is condemned to death.
- (e) Capital punishment is being gradually abolished by the civilised society.

The argument advanced in favour of retaining capital punishment cannot stand scrutiny. For example it is argued that because of long periods of unrest in the country, there are many criminals who fear only death and no other punishment. And that if capital punishment is removed they are likely to continue to commit wanton murders without much fear of life imprisonment when arrested. That the death penalty, although cruel, has the force of deterrence, thus protecting society from other would be murderers that history has shown that as each new regime came to power, prisoners sentenced to life imprisonment for murder have used the confusion to escape and to again terrorise society and commit murders. And that many murders are committed not by people who are psychologically sick,

64 *Ibid.*

65 These arguments are taken from U.C.C report *Supra* note 2 para 7.120.

but people who consciously and intentionally decide to eliminate their enemies or rivals in business or politics or land or employment or by those hired for money or other incentives to eliminate innocent people. The advocates of the death penalty cynically add that the death penalty is seen by some as a clear indication to all that life is sacred, the most important value in society and therefore, whoever deliberately takes the life of another should lose his or her own. And they conclude by saying that some countries which have abolished the death penalty are now discussing seriously its possible restoration because of the “perceived” increase of murders.⁶⁶

The above arguments are based at: the theory that capital punishment is supposed to be society’s retribution or revenge.⁶⁷

However this reasoning is suspect, to say the least. In any case is retribution an appropriate system of criminal justice?

Retribution carries with it some negative implications for this reason, and as can be seen from the reasons advanced to the U.C.C, supporters of capital punishment have tended to down play retribution and use the deterrence theory as a common political justification. It is claimed that capital punishment has the unique general deterrent capacity to save more lives or significantly reduce other capital offences. There are two interpretations of the deterrent capacity to save more lives or significantly reduce other capital offences. There are two interpretations of the deterrence.⁶⁸

In the first place, it implies that the existence of the death penalty for an offence has a moralising influence on society’s perception of the gravity of the offence. It, therefore, strengthens people’s inhibitions about committing it. The conclusion they reach is that if it is abolished, capital offences will increase. Some countries have retained the capital punishment for this symbolic reason. For example Belgium has increased the range of capital offences even

66 The argument that follows with some minor modifications based on the writer’s article ‘*Analysis of Capital Punishment*’ Uganda Confidential, Vol. 53 8-15 November 1993 pp 8-9.

67 J. Andanaes “Punishment and deterrence 1974 esp. ch 4.

68 Roger Hood “*The Death Penalty: A World- Wide Perspective*” Oxford, Clarendon Press 1990.

though no one has been executed since 1945 and none for murder since 1918.⁶⁹

Secondly, deterrence implies that the threat of being executed makes those who are about to commit a capital offence to desist in more cases than would be the alternative sanction, say life imprisonment. In other words it is assumed that there is a relationship between the risk of execution and the rate of capital offence. But if it does not have such utility, or if it does not control crime through incapacitation of the criminal beyond what can be achieved by life imprisonment, then it is nothing other than the purposeless and unnecessary infliction of pain and suffering.

A study by David P. Phillips⁷⁰ of highly publicised executions in Britain revealed that during the week of executions and two week after that there was decrease in capital offences but such a decrease was cancelled by an increase in the next few weeks. The only study, I am aware of, in Africa was carried out by A.A. Adeyemi⁷¹ in Nigeria. Its conclusions cast doubts on capital punishment as a deterrent.

He found that there was no consistency in the relationship between the averages number of executions carried out and the incidence of either murder or armed robbery. In some periods an increase in executions was matched by 'an increase in crime and in other periods by a decline. He also discovered that the introduction of capital punishment for armed robbery in 1970 was followed by an increase rather than a decrease in armed robbery. Adeyemi's findings seem to be supported by that is happening in Uganda today.

There has been a dramatic increase in armed robbery since the execution at Luzira in March 1993. Yet one of the executed persons was supposed to have been an armed robber. The recent controversial policy of 'shoot to kill' aimed at organised armed robbers has not decreased daring daylight robberies in Kampala.

The extra judicial executions at Namanve and on Ben Kiwanuka Street were followed by more daring robberies of banks and Forex

69 *Ibid* passim.

70 Quoted in Roger Hood *Supra*.

71 Death penalty, Criminological Perspectiveness. The Nigerian Situation. (1987) RI de Droit Penal 485-502.

Bureaus. Car robberies by armed people are reported almost daily. The introduction of capital punishment for defilement has been followed by an alarming increase in reported cases of defilement. There is hardly any evidence to show that capital punishment deters crime. It has been reported for example that in the year 1993 Kampala registered 165 murder cases, 313 cases of rape, 9953 armed robberies and 537 burglaries.⁷²

The Uganda constitutional Commission and Abu Mayanja, the Minister of Justice and Attorney General have based their reasons for maintaining the death penalty partly on the belief that it is a deterrent, in the second sense of that word, and partly on other questionable grounds. These are the perceived weight of public opinion and the belief that it should remain for “truly exceptional cases” or “extremely serious crimes”.

As for public opinion, the mistaken perception is that the abolition without unanimous public support would undermine confidence in the law and perhaps lead to private vengeance. It is further argued that the state must express the will of the people. And that it is anti-democratic to ignore strong public sentiment. The simple answer here is that popular sentiment alone should not and cannot determine government policy let alone penal policy. This is the task of elected representatives, using, as they must, their own judgement.

If popular sentiment alone was to determine government policy, by now Uganda would have free primary education, free health care, a living wage for workers, a reduced tax burden and possibly no privatisation of public corporations. As for leaving the death penalty for serious crimes one can only say that sentencing anyone to death is very freakish and cruel. In any case, there is the fear among politicians supporting the “exceptional case” or ‘serious crimes’ argument that abolition may be perceived as a sign of weakness on the part of the government. The most damning rebuttal to this type of thinking is that executions have a serious brutalisation effect on society.

72 New Vision, 3 February 1994 p. 15.

Capital crimes, especially murder, may be stimulated and not suppressed by executions of offenders. Brutalisation can be looked at on two levels. One is that in the short term executions would stimulate the would be offender by releasing inhibitions because he or she would identify with the state as an enforcer seeking lethal vengeance. The drama surrounding executions stimulates certain people to seek notoriety or to see it as an alternative to suicide. Therefore in the aftermath, there is an increase and not a decrease in capital offences.

But brutalisation also implies that the message given by executions stipulates rather inhibits violence and especially condones killings as vengeance. To use Cesare Beccaria's⁷³ famous words "the death penalty cannot be useful because of the ... of the barbarity it gives people". It is absurd that the laws, which are expressions of the public will and which, for example, detest and punish murder should themselves be a party to it. It is therefore being over cynical for the U.C.C to say that the death penalty is a clear indication to all that life is sacred and the most value in society and therefore whoever deliberately takes the life of another should loose his or her life.

Uganda provides a good example of the brutalising effect of executions. Before the infamous public executions of Idi Amin, Ugandans generally had a lot of respect for human life, But now things like the Kibimba, Namanve and Iganga murders do not seem to shock people. The recent murder of six boys in Rukungiri for an alleged rape and murder of a teenage girl generated no public debate on pros and cons of extra judicial executions and the right of a suspect to fair trial and presumption of innocence until proved guilty. There are many cases reported in the press where security agents just shoot people as robbers without raising an eyebrow. Yet that such people may not have committed any offence has not pricked many people's conscience. There was the controversial shooting of a boy at Kyambogo according to one version or at Kireka according to another as an armed robber. But there are witnesses who say he was not. It has even reached a stage where the public take suspects from the hands of the police and kill them sometimes with the active connivance of the police, As Professor Saidi said:

73 Cesare Beccaria on *Crimes and Punishments*, trans. H. Paolucci 1968 p. 50.

The case of murder, for instance, does not make so much news. In Tanzania, if somebody dies, the story will most probably be published on page one because it is big news. In Uganda it is different; people have heard of many more deaths in the past.⁷⁴

The argument based on history of unrest to support capital punishment is illogical. If countries like Namibia and Jamaica can abolish capital punishment when still fighting civil war and serious crimes for decades one cannot realistically take 'unrest' as a serious justification for capital punishment. Moreover the abolition of capital punishment will have a strong moralising effect and lead to the restoration of respect for human life and dignity. It has already been argued that the basis for protecting human rights is the centrality of the individual person and human dignity. Therefore preservation of the person should be the most important aspect of human rights.

The argument that countries which abolished capital punishment are seriously considering restoring it is totally misconceived. In Australia, homicide rate per 100,000 of the population has fallen since the last executions in mid 1960s. In 1986, then years after abolition of the death penalty, the homicide rate in Canada was lower than it had been before abolition. In Jamaica the homicide rate hardly changed during the moratorium on execution between 1976 and 1982. It is true that there was an increase in Britain between abolition in 1966 and 1985. But this increase is more related to the willingness of jurors to convict for these serious offences since they know the convicted persons are not going to be executed. It is for these reasons that in^o both Canada and Britain attempts to re-introduce the death penalty have been defeated on a free vote in parliament.

It seems the commission did not give sufficient weight to the people views that:

.... the right to the life has been the right most violated With every change of government many people lost their lives. A few were shot by firing squads. All these sad events have made human life look very cheap and minimised the importance of human dignity. The vast numbers of widows and orphans are lasting evidence of the gross violations of the

right to life. This awful experience has led many people to put forward the view that a government that cannot protect lives of its citizens has no legitimacy to govern.⁷⁵

It is submitted that you don't protect peoples lives by destroying lives.

RIGHT TO EDUCATION

As already stated above there are so many orphans and street children in Uganda. There are also families whose income cannot be sufficient to educate the children. Yet the children are future leaders and workers who must be educated for those roles. It also goes without saying that building of a democratic society needs among other things an informed public. Therefore the ability to, at least read, is an essential component of a democratic society.

It is for this reason that the *International Convention on Economic, Social and Cultural Rights* provides in Article 13 *Inter alia* the signatories recognise the right of every one to education. They agree that education should enable all persons to anticipate effectively in a free society. Thus sub Article 13(2)(a) states that "primary education shall be *Compulsory* and *free* to all". Article 7 of the Declaration of the Rights of the child states that "the child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages". Further the International Declaration of Human Rights to which Uganda is a signatory provides in Article 26 that:

Everyone has a right to education. Education shall be free, at least in the elementary education shall be compulsory

Therefore, Article 62(2) should be modified to provide free and compulsory education in primary schools. The Draft Constitution puts the burden on parents who may not have a means of affording the fees.

RIGHT TO MARRY

It has already been stressed that the freedom to associate is protected by the concept of liberty and this right is connected to the

75 *Supra* Note 2 para 7.53

fundamental right to privacy which includes freedom to choose one's spouse and to maintain a relationship with members of one's family.⁷⁶ It has been said in one case that the court has:

recognised that the freedom to enter and carry all certain intimate or private relationship is a fundamental element of liberty protected by the Bill of Rights. Such relationships may take various forms, including the most intimate. We have not been able to mark the precise boundaries of this type of constitutional protection. The intimate relationship to which we have accorded Constitutional protection include marriage, the begetting and bearing of children, child rearing and education; and cohabitation with relatives. Of course we have not held that constitutional protection is restricted to relationships among family members. We have emphasised that the first Amendment protect those relationships, that presuppose "deep attachments and commitments to necessarily few other individuals with whom one shares his or her only community thoughts, experiences and beliefs but also distinctively personal aspects of one's life."⁷⁷

It has also been argued that the right to associate include the right to disassociate.⁷⁸ For these reasons Article 60 should have an additional provision necessary to remove discrimination against women contained in the Divorce Act. Under the act men can divorce their wives on proof only of adultery. But women can only divorce their adulterous husband only on proof of adultery plus cruelty. This additional provision would also be consonant with Article 60(2) which recognises marriage as a contract. Therefore the constitution must remove the conception that divorce must depend on fault such as addition would protect spouses against such diseases as AIDS and give a remedy when the only complaint by one of the spouse is lack of sexual satisfaction, and not any other fault.

DISCRIMINATION AND EQUALITY BEFORE THE LAW

Article 50 guarantees protection against discrimination and clearly states that every person is equal before the law. Equality before the law assures to the individual the right to equal treatment. With other

76 *Loving v Virginia* *Supra* and see *Moore v City of East Cleveland* 431 U.S. 394.

77 *Board of Directors of Rotary International v Rotary Club* 481 U.S. 537 (1987).

78 *Supra* Note 62.

individuals in similar circumstances. It prohibits laws which require that some individuals within a single class should be treated by way of punishment more harshly than others.⁷⁹ In other words, the right of the individuals to equality before the law and to equal protection of the law require that like should be compared with like.⁸⁰ In applying the idea that like should be treated alike it is of course necessary to remember also that groups cannot be singled out for constitutionally unjustifiable discrimination.⁸¹ Thus Ritchie J. could not agree with an interpretation:

pursuant to which it seems (to me) that the most glaring discriminatory legislation against a racial group would have to be construed as recognising the right of each of its individual members of equality before the law; so long as the other members are being discriminated against in the same way.⁸²

Equal protection of the law is similar to discrimination. And in the political sphere it means equal representation on the basis of one man one vote that equal electoral areas should be represented by the number of representatives and that as far as possible electoral areas should be equipopulus.

The right against discrimination and to equal protection of the law are not absolute and are not interpreted as rigidly as the other rights discussed above. Therefore there can be discrimination and a disregard of equal protection of the law if there is a constitutionally legitimate purpose for it and the means used bear a reasonable means to it.⁸³

For example in the United States it has not been possible to attack discrimination against aliens in business and employment.⁸⁴ In India where Article 14 used double expression of “equality before the law and the equal protection of the law” has not enabled the courts to declare unconstitutional, a concession given to the residents of a

79 *Og Ah Chuan v Public Prosecutor* (1980) 3 WLR 855 at pp 867-868.

80 *Ibid*, Also *Clarke v Karika* (1985) LRC (Const) 732 at 745.

81 *Clarke v Karika Supra* at p. 745.

82 *Regina v Drybones* (1969) 9 DLR (3rd) 473, at 484.

83 *Reynolds v Sim* 377 U.S. 533 (1964) *Brown v Thomson* 462 U.S. 835 (1983) *Karcher v Daggett* 426 US 725 (1983) *Davis v Bandamer*. 478 US 109 (1986).

84 *McGowan & Maryland* 366 U.S. 420 1961 at p. 425, *Clarke v Karika Supra* p. 746.

state in the matter of education⁸⁵ or a law providing for expulsion and detention of foreigners.⁸⁶ What is prohibited is discrimination in a way which singles out persons for reasons not with legitimate and apparent legislative purposes.

ECONOMIC AND SOCIAL RIGHTS

Article 65 which embodies the right of every citizen to participate in government should also include the right to be involved in the public service of Uganda or of a district. Similarly Article 67 should include important aspect of economic and social rights in particular;

- (a) The worker should have a right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity and a right to social security.
- (b) Every Ugandan citizen worker should be entitled to a standard of living adequate for the health of himself and family, including food, clothing housing and medical care.

REPETITIONS IN ENUNCIATED RIGHTS

It should be noted that Article 51 enumerates all the rights to be protected which are repeated by other provisions of the chapter. This is also the scheme of the current constitution and indeed of most constitutions in the Commonwealth. In Uganda, this scheme seems to have been dictated by the need to put specific exceptions. In the constitutions of other commonwealth countries such an article is merely declaratory. For example, section 5 of the constitution of Malta 1961 provided:

WHEREAS every person in Malta is entitled to the fundamental rights and freedoms of the individual, that, is *£0* say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex but subject to the rights and freedoms of others and for public interest to each and all the following namely:

- (a) life, liberty, security of the person and the protection of tile law;
- (b) freedom of conscience, of expression and assembly and association;

85 Cushman & Cushman (ed) *Cases in Constitutional Law* 4th ed. pp 799-801.

86 *Joshi v State of M.B* (1955) ISCR 1215 at 1228.

- (c) protection for the privacy of his home and other property and front deprivation of property without compensation, the provisions of this part of this order shall have effect for the purpose of affording protection to the said rights and freedoms. Subject to such limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

The wording of this section is substantially similar to Section 70 of the Constitution of Kenya. When commenting on the Kenyan section the court had this to say:

This is the first section in chapter V... It commences with the word “whereas”. Although given a separate number this section is quite clearly ill the nature of a preamble. This section itself creates no rights; it merely gives a list of rights and freedoms which are protected by other sections of the chapter. That is the reason why it enumerates only those rights which are provided for in later provisions. Section 70 may be of help, in interpreting any ambiguous expressions in later sections of chapter V, but it itself gives no rights or freedoms.⁸⁷

And when commenting on a similar provision in the constitution of Malta, already quoted, the Privy Council said:

It is to be noted that the section begins with the word “whereas” though the section must be given such declaratory force as it independently possesses, it would appear in the main to be in the nature of the preamble. It is all introduction to and ill a sense prefatory or explanation note in regard to the sections which follow. It is a declaration of entitlement ...The section appears to proceed by way of explanation of the scheme of succeeding sections.⁸⁸

This means that in Kenya and Malta such a section cannot ground a cause of action. It does not give any right. But the position in Uganda is different; Article 51 of the DC, which corresponds to Article 8 of the existing constitution gives rights which can be enforced.⁸⁹ For this reason there is no justifiable reason for repeating the protected rights and freedoms other than appending to them the exceptions. As argued earlier once a general justification for

87 *Shah Vershi Dershi & Co Ltd. v Transport Licensing Board* (1971) EA 289 at 298.

88 *Olivier and another v Bulligieg* (1966) 2ALL ER 459 at 461.

89 *Ssempebwa v Attorney General* Const. case No. 1 of 1987, *Shah v Attorney General*.

derogations is accepted then the right and freedoms can be stated briefly without repetition. This will also be closer to the majority views presented to the U.C.C which wanted the fundamental rights and freedoms to be stated in absolute terms and leave it to the courts to create reasonable limits. The rights and freedoms in the American constitution which are expressed in absolute terms were limited by the courts using the “clear and present danger”⁹⁰ test which was designed to prevent proximate tendencies that would be of grave and immediate danger to interests which the state may lawfully protect.⁹¹

HUMAN RIGHTS AND INDEPENDENCE OF THE JUDICIARY

The U.C.C says that many people expressed concern about the way the:

execution arm of government has interfered with the judiciary over the years... The courts are widely perceived as being unwilling to take stands against the executive especially in constitutional and human rights cases.⁹²

And yet there was a consensus in the peoples views that effective administration of justice requires an independent judiciary.

Independence is also crucial if courts are to act as all effective check on unconstitutional acts of the executive and the legislature.... Independence implies freedom from the executive or the legislature in the exercise of judicial functions.⁹³

The commission is also of the view that the majority of the people were agreed that :

The rule of law must be adhered to and maintained. The rule of law implies that all people, but especially, those in authority should act according to established principles of law. Whoever deviates, whatever his or her position must be punished.⁹⁴

90 *Schenek v United States* 249 U.S. 47 (1919).

91 *West Virginia State Board v Barnette* 319 U.S. 624 (1943).

92 *Supra* Note 2 para 17.24

93 *Supra* Note 2 17.37.

94 *Supra* Note 2 para 17.38.

The recent constitutional cases, seem to support peoples views that the judiciary fears to take a stand against the government In one case the High Court decided that the Civil Procedure & Limitations Act which requires sixty days notice of intention to sue the Attorney General was within the provisions of Article 22(5) permitting parliament to make provisions with respect to practice and procedure.⁹⁵ The court completely shut its eyes to the fact that Article 22 is supposed to provide summary procedure for enforcement of rights because the judge feared to give a ruling unfavourable to the government. Now another High Court judge has ruled that the requirement of notice is not covered by Article 22(5) because the Act, was not enacted under that sub Article as it did not enable the court “more effectively to exercise the jurisdiction conferred” upon it by Article 22. So he was of the view that when proceeding under Article 22 there is no requirement to give notice.⁹⁶ In another case the judge opted to refer the issues to a constitutional court rather than give a ruling unfavourable to the government even though the defendant (Attorney General) had not adduced evidence to enable the court to determine that the question referred was sufficiently important to the proceedings” as required by the proviso to Article 87(1). Even when the reference was made the constitutional court gave a judgement without interpreting the constitution.⁹⁷ All this as done because the executive was quoted in the media as saying that it would not accept any ruling favourable to the applicants and therefore against the state.

It may therefore be a pipe dream to expect the judiciary to be the guardian of the constitution unless and until it stops catching a cold whenever the executive sneezes. The enforcement of rights may be illusory, The proposal to have access to international tribunals may go a long way to put pressure on the judiciary to properly exercise its powers and duties to protect the individuals fundamental rights and freedoms.

95 *C. Ogwal and others v D.A. Mbale and others.*

96 *J. Rwanyarare and others v Attorney General* (No. 2) Misc. App. No. 85 of 1993.

97 *J. Rwanyarare and others v Attorney General.* Constitutional case No. 1 of 1994.

CHAPTER VI

LAND AND PROPERTY RIGHTS

BY PETER MUKIDI WALUBIRI

INTRODUCTION

Man as a living thing needs various material things for his survival. He needs food, clothing, medicine and shelter for bare existence. As society becomes more civilised and developed, man's material aspirations multiply to include other necessities like cars, books, television sets, fridges, palaces, computers amongst others. The instinct for man to acquire material possessions is almost insatiable. It accounts for man's hard work greed and criminality. Wars have been fought and peace made over material wealth. All philosophies, religions and political systems be they capitalist, socialist or communist in varying degrees allude to the important role of material wealth in human relationships. The subject of property rights is therefore a crucial issue in the constitutional making exercise now underway in Uganda.

There is no other form of material wealth that is more precious than land:

Land is the source of all material wealth. From it we get everything that we use or value, whether it be food, clothing, fuel, shelter, metal or precious stones. We live all the land and from the land and to the land our bodies or our ashes are committed when we die. The availability of land is the key to human existence and its distribution and use are of vital importance.¹

It is because of the crucial importance of land to man and indeed to all living things that I have deemed it pertinent to discuss the specific subject of the right to land instead of dealing with property rights in

1 Simpson S. R.: *Land Law and Registration* Book 1, Surveyors Publication, London, 1984 P. I.

general. Besides I am of the considered opinion that the proposals in the DC regarding protection of property appear adequate.²

In this paper I propose to handle the subject by first setting forth three possible theoretical approaches to the question of land in the new constitution. I will then outline basic features of the land holding system in Uganda and discuss the historical causes of those features. I will then proceed to discuss how the existing constitution and laws have handled the land question before identifying outstanding issues that need to be settled by the new constitution. After identification of the issues there will follow a discussion of the solutions on what I consider the most satisfactory solution.

POSSIBLE THEORETICAL APPROACHES

One can look at land from three angles. Land can be viewed as ordinary property. It can also be looked at as an inalienable human right; and can be considered an economic resource. There are different reasons why land may be categorised in either of the above three approaches. Secondly, each of the above categorisation of land will lead to different rules in terms of land distribution and use.

Land as ordinary property

Land can be rationalised as ordinary property because the process of its acquisition and loss does not differ from that of other property. Just like furniture, motor vehicles or jewellery, land can be acquired through purchase, inheritance, fraud or gift. It can also be lost in a similar manner. Land is in this perspective material wealth like any other commodity.

If land is perceived as being similar to any other forms of property, there is no need for special rules to regulate its acquisition, use and alienation in the new 'constitution. This will mean that the general provisions regarding property rights will be enough to dispose of land issues. The only issue would be to determine according to existing laws who owns which parcel of land. Once the question of ownership is settled, the recognised owners should be free to deal

with their property according to their wishes. Restrictions on land dealings will all have to be removed.³

The greatest weakness with this approach is its failure to recognise the unique nature of land. Land as a fixed natural resource is the basis of all human activity. While it is possible for mankind to survive without other forms of property, it is not possible for the human race to survive without land. Land must therefore be treated as a special form of property.

Land as an inalienable human right

Because of its unique attribute as the source of livelihood, land can be categorised as an inalienable human right. Here land is equated to other universally recognised human rights like the right to life, freedom of expression, association, belief and assembly.

If land is appreciated as a human right, the practical effect would be that every citizen of Uganda should be entitled to a fair share of the available land in the territory. To realise this aspiration the entire country will have to be surveyed and each citizen allocated his fair share of the land. There will have to be a problem of reallocation of land from those who have a lot to those who are landless. Inevitably those who have land will resist its reallocation. This will be a source of conflict and insecurity.

There is also the problem of how to cater for the requirements of the future generations. Do we reserve some land for them and if so how much; or only those who are living today should have an entitlement, thus leaving the unborn the only alternative of inheriting their parents or relatives shares?⁴

Land as an economic resource

The other alternative is to regard land as an economic resource just like minerals, water, raw materials, electricity. Here land is looked

3 For example, restrictions of sale of land to non-Africans under the Land Transfer Act, Cap. 202-s.2.

4 If the entire country is divided up now and future generations allowed to subdivide these portions the result will be small uneconomic parcels of land.

at in strictly economic terms as a factor of production along with capital, labour and entrepreneurship.

The application of this theory implies a rejection of the notion that land is a human right. Under this resource theory, rules regulating land rights have to be rooted in economics. The guiding principle will have to be the need to put land to the most optimum economic use. This theory has no room for social considerations.

In practical terms there will have to be careful planning of how best the available land will be put to optimum use taking into account the forces in the market place. Land will have to be parcelled out into sizeable economic units and sold or leased to modern farmers or industrialists who can employ the landless and produce more wealth. Tills theory has no room for allocation of small parcels of land to peasants using backward technology. Such peasants would be better catered for as wage earners on modern farms and factories. As wage earners they would not face the prospect of starvation when their small fields of grain are destroyed by the vagaries of weather.⁵

The greatest weakness with this theory is its failure to address the other attributes of land apart from its value as a factor of production. Land ownership determines where families and particular communities settle. It affects both custom and religion and is a major factor in societal cohesiveness and stability.

In economic terms the approach is also very hypothetical in the circumstances of Uganda. It is not feasible in the next two or so decades for us in Uganda to have the technology and managerial capacity to run modern large scale farms or industries throughout the country. For the foreseeable future therefore, ours will remain a predominantly peasant economy. In such an economy an army of landless people is a source of economic and political instability.

BASIC FEATURES OF THE CURRENT LAND HOLDING SYSTEM

Whichever of the above imperfect approaches or any combination of them that we may wish to adopt and modify, there are serious practical problems to contend with when trying to translate theory into practice.

5 Recent press reports have highlighted the on-going famine in Karamoja, Teso, Pallisa and Kamuli.

When treating the subject of land in the new constitution it should be appreciated that we are making a new piece of furniture from a heap of timber. Rather we are attending to an existing delicate flower. We want it to grow towards our desired direction and to a specific light. Such a task calls for care and skill lest our flower may break or whither away.

In addressing the land question in the new constitution the following realities must be taken into account:

- (i) Millions of peasants throughout the country are physically occupying several parcels of land. They claim these parcels as their property and their local communities and indeed our existing law to some extent recognises their claim.⁶
- (ii) Several hundreds of thousands of people have registered interests in land be it Mailo, freehold or leasehold. These interests are recognised by our existing laws.⁷
- (iii) Parts of registered land are currently occupied by squatters. Some of the squatters have been occupying the land for decades.
- (iv) There are several land based resources like wet lands, forests, water bodies that are communally exploited without claim of ownership.
- (v) There are several thousands of landless people especially in urban and peri-urban areas of Uganda.
- (vi) The total acreage of Uganda is constant and yet the population is growing by the day. Land should be allocated and used sustainably to cater for the needs of a future larger population.

HISTORICAL CAUSES OF THE CURRENT LAND HOLDING SYSTEM

The features of the current land holding system in Uganda outlined above are the products of our own history and the impact of colonialism and government policies after the attainment of political

6 section 3(1) & (2) Land Reform Decree, 1975.

7 section 56, Registration of Title Act, Cap. 205 recognises registration as conclusive evidence of proprietorship of an interest of land.

independence. These features are discussed in some detail in the following section.

The customary system before colonialism

Before colonial rule each of the several communities that now make up present day Uganda had its own system of land holding. These systems differed from community to community but it is not the intention of this paper to look at the details of these different systems. Suffice here to say that there were some basic similarities in these systems some of which survive up to today:

- (i) Everyone had access to land through hi; family and clan. Although the individual was in most cases not an owner of land he had rights to use it. Strictly speaking then, there were no landless people in the pre-colonial communities of Uganda,
- (ii) In most of the communities the concept of individual land holding was generally not vet recognised.
- (iii) The land holding systems were basically communal. Rights to land were vested [sometimes by the King or Chief] in the clans and families. It is the clan and family structures that allocated land and settled land disputes.
- (iv) The dealing in land by way of sale, lease or mortgaging was generally non-existent in these pre-industrial societies.
- (v) The general community had access to communal lands for water, firewood, salt licks and pasture.

These were the basic features of the customary land holding system.

With the advent of colonialism new systems of land holding were introduced in Uganda and new laws were enacted. These had a serious impact on the existing customary systems.

The Mailo system of land holding

The earliest of these new systems was the mailo system of land holding. On 10 March 1900 Harry Johnstone, Her Majesty's Special Commissioner, Commander-in-Chief and Counsel General on behalf of the Queen of Great Britain and Ireland, Empress of India signed a historic agreement with the regents and chiefs of

the Kingdom, Uganda, on behalf of the Kabaka, Chiefs and people of Uganda.⁸ By this agreement British rule was established over Buganda.

Article 15 of this agreement dealt with the question of land. It was estimated that the Kingdom of Buganda comprised a total of 19,600 square miles. These were divided between the Protectorate Government [10,550 square miles] on the one hand and the Kabaka, members of the Royal family, Chiefs, 1000 private landlords and existing missionary societies [19,550 square miles].⁹ By the stroke of the pen nearly one half of the land in Buganda became Crown land and the other half was to be divided up between not more than 1050 people.¹⁰ The notion of [square] miles was translated into mailo hence mailo land.

This new system of land holding was clearly defined in the Buganda Possession of Land Law, 1908 by which the mailo owner was empowered to alienate his mailo, by sale, gift or will except to a person who is not of Ugandan origin.¹¹

This system of land holding, akin to freehold, for the first time introduced, clearly individualised ownership of land. By the stroke of a pen a few landlords were created in Buganda leaving the bulk of the population as tenants. With the introduction of the cash crop economy, the landlords increased the rate of Busulu and envujo (rent) payable by the tenants leading to widespread complaints from the tenants. An official inquiry by the protectorate government recommended that there be a redistribution of land in Buganda but this was not done.¹² Instead the Busulu and Envujo Law was enacted in 1928. Under this law the rates of Busulu and Envujo were standardised and restricted and the peasants could not

8 The Regents and Chiefs who signed were Apollo, Katikiro, Regent; Mugwanya, Katikiro, Regent; Mbogo Noho, Chie; Zakaria Klrito, Kangawo, Regent Sebalu, Pokino; Yakobo, Kago; Paulo Mukwanda, Kasanuigwa of Koki. By General Notice of 1 July 1908 the name of the Kingdom was corrected to read Buganda.

9 See text of the articles for details of who got what share of the land.

10 Owing to delays in survey and other settlement difficulties the number of claimants rose to 4,138. See Generally H. W. West *The Mailo System in Buganda* Government Printer, Entebbe, Uganda, 1964 Chaps. 2 & 3.

11 See S.2(b)(c)(d)(e).

12 The protectorate government still saw economic sense in a semi-feudal system of land holding.

be forced off their bibanja without an order of court. It is from this law that the perennial problem of squatters on registered land stems.

Two types of mailo estates were created in the Buganda Agreement of 1900. One was private and the other official. Private estates were personal estates that the holder could alienate freely. On the other hand official estates were held by virtue of office and did not pass to the holder's family upon death or loss of office. These passed to the next holder of office.

The Freehold Tenure

In 1903, the first substantive land law for the Uganda protectorate was enacted. This was the Crown Lands Ordinance. In the ordinance the governor was empowered to alienate crown land in freehold.¹³ This system of land holding imported from England, confers absolute title to the holder of land. The few grants in freehold made by the governor were to European planters in rural areas and European and Asian merchants in towns. By 1930, the protectorate government had decided that Uganda was not to be a settler economy. The primary producers were to be peasants. Grants in freehold especially of rural land were accordingly stopped.

Under the Toro and Ankole Agreements of 1900 and 1901 respectively, chiefs were, like their contemporaries in Buganda, allocated both official and private parcels of land. Under the Ankole Land Lord and Tenant Law, 1937 and Toro Land Lord and Tenant Law, 1937, the grants to these chiefs were recognised as freehold. There was protection of the tenants on these freeholds under the Land Lord and Tenant Laws. Again, as it happened in Buganda, tenants could not easily be evicted from the land.¹⁴ This has contributed to the problem of squatters on registered land in Toro and Ankole.

There was another type of freehold known as adjudicated freeholds. The idea behind these freeholds was to encourage natives to register their customary holdings and obtain Certificates of Title.

13 Section 3 Crown Lands Ordinance, 1903.

14 See Sections 10, 12, 13, 14, & 15 of the Ankole Land Lord & Tenant Law, 1937. There are identical provisions in the Toro Land Lord and Tenant Law.

The process would have to involve local adjudication committees to settle problems of ownership.

After prolonged consultations and discussions only the Districts of Bugisu and Kigezi and the Kingdom of Ankole accepted the proposals of government. Pilot schemes of systematic adjudication and survey followed in parts of Kigezi, Ankole and Bugisu. Ultimately the schemes were abandoned and not all the land adjudicated was surveyed. Even some of the land that was surveyed was actually never titled as people were more interested in settling boundaries.

Leasehold Tenure

Under the Crown Lands Ordinance, 1903,¹⁵ the Governor was empowered to grant leases out of Crown land. Up to 1962 several grants were made. There were normally grants of 49 or 99 years and were subject to development conditions. The majority of the grants in urban centres were to Asian merchants. By 1962 some Africans had also got grants mainly in rural areas with some few in urban areas.

With the coming in force of the Registration of Titles Ordinance, 1924, all proprietors of mailo, freehold and leasehold estates could register the same and obtain Certificates of Title.

Restrictions of Transfer to Non-natives

All the above respective grants were subject to the provisions of the Land Transfer Ordinance, 1906.¹⁶ This ordinance prohibited the occupation or holding or transfer of any land in the occupation of or held by any native of the Uganda Protectorate to a person not being a native of the Protectorate without the consent in writing of the Commissioner [later Governor].

By the time of independence, then, some of the present-day problems and land issues were already in the making. The problem of a multiplicity of tenures was with us. Pressures on customary land holding system were growing and the fear of aliens grabbing land

15 Section 3 Crown Lands Ordinance, 1907.

16 This was subsequently repealed and replaced by ordinance No. 6 of 1944.

from natives was well in place. The problems of tenants, squatters and the landless were beginning to manifest themselves. The following sections will turn to the discussions of how these problems and issues have been addressed by the 1962, 1966 and 1967 Constitutions and legislations made since 1962.

THE HANDLING OF LAND ISSUES IN THE INDEPENDENCE AND POST INDEPENDENCE CONSTITUTIONS AND LAWS

The Constitution of Uganda, 1962

After a delicate negotiating process that involved formation of alliances and cliques, the independence Constitution of 1962 was eventually agreed on and came in force on 9 October, 1962. Under this Constitution Uganda had a semi-federal set-up comprising of Federal States, Districts and the territory of Mbale.¹⁷ This semi-federal set-up was a delicate balance of power at national level and power at local levels [state, District, territory].

Within this semi-federal structure, land was to be controlled and administered at both the central government level and at the state/District level. The Uganda Land Commission, and for each federal state or District, a Land Board was created.¹⁸

The Land Commission was charged with the duty of holding and managing any land vested in it by any law or acquired by the government of Uganda. It was also to enjoy such other powers and duties as may be prescribed by Parliament.¹⁹ The powers and duties of a Land Board of a Federal State or a District were to hold and manage for the benefit of the people of the state or District any land vested in it by any law or acquired by the Government of the State or that Administration of the District and to exercise such other powers and duties as may be prescribed by parliament or in case of the Buganda Land Board, by any Law in force in Buganda.²⁰

17 Art. 2.

18 Art. 118(1).

19 Art. 118(7).

20 Art. 118(8).

The above provisions in the 1962 Constitution of Uganda, restricted the mandate of the Uganda Land Commission and State/District Land Board to the holding and managing of public land on behalf of the people of Uganda or of the federal state of district. Their powers did not extend to private land (mailo and to an extent freeholds). Even with public land the Constitution failed to address itself to the details of the issues of tenure, use and management of land.²¹ The result was that substantive matters of tenure, land use and management were left to be dealt with under existing law and by parliament at a subsequent time.

The only existing law at the time was the Public Lands Ordinance, 1962, which had come in force on 1 March 1962, before but in anticipation of the Constitution of 1962. Under this ordinance all crown land which immediately prior to the commencement of the Act had not been demised by way of lease under the provisions of the Crown Lands Ordinance and was occupied by government for public purposes was vested in the Land Commission in freehold together with all land to which government was seized, possessed or entitled.²² The rest of the public land was vested in the respective Land Boards or public bodies occupying the same.²³ The essence of this arrangement was that Uganda Land Commission would only hold land where central government institutions like Hospitals, Courts, Offices were situated. The bulk of the public land which was not yet alienated would be managed by the Land Boards directly. The Land Boards were, however, to manage only rural lands. All land in urban areas was to be granted by the Land Boards in statutory leases to respective Urban Authorities for day-to-day management.²⁴

21 See Art. 118(10)(c)

22 Public Lands Ordinance, 1962, S.11 [Cap 201 Laws of Uganda 1964 Edition]

23 *Ibid* SS.12, 13 & 14. The public Bodies were:

1. The common services Authority and all the departments of the common services organisation which hold land directly or on behalf of which the Governor holds land.
2. The U.E.B.
3. The University College of E.A. (Makerere) or the Makerere College Council.
4. The Kampala District Water Board.
5. The Empire Cotton Growing Association.

24 *Ibid* S.15.

Thus all unalienated public land was to be administered by Land Boards and Urban Authorities as the Controlling Authorities. These authorities had general power of disposal of land as they thought fit.²⁵ The only restrictions were that a grant of public land in freehold in excess of 1000 acres required the prior consent of the Minister of Lands and that grants of leases in urban areas were not to exceed 99 years.²⁶

Recognition was given to the customary tenure in the Public Lands Ordinance. Any person holding by customary tenure, any unalienated public land which was not in an urban area, and in respect of which no tenancy or other right of occupancy had been created, could continue holding such land lawfully without any grant, lease or licence from the Controlling Authority.²⁷

However, a controlling authority could make a grant of a lease or freehold of public land occupied by a customary tenant on condition that such tenant is moved to another area equally suitable for his occupation or compensated.²⁸

It can safely be said that apart from decentralisation of land control and management, the 1962 Constitution and the Public Lands Ordinance, did not make any fundamental change in the system of land holding and land use. It left untouched most of the problems and issues that existed before independence.

The Republican Constitution of 1967

The delicate semi-federal structures set up in 1962 eventually collapsed in 1966. The 1962 Constitution of Uganda was abrogated and an interim Constitution promulgated on 15 April 1966. This interim Constitution made provision for the establishment of a Constituent Assembly to enact a new Constitution.²⁹ The existing National Assembly resolved itself into a Constituent Assembly and on 8 September, 1967 promulgated a new Constitution for Uganda.

25 *Ibid* S.19.

26 *Ibid* S.20 & 21 respectively

27 *Ibid* S.22(2).

28 *Ibid* S.22(1).

29 Constitution of Uganda, 1966 Art. 145.

The essence of the 1967 Constitution was to turn Uganda into a Republic. All existing federal structures were abolished or phased out. As regards land, the District Land Boards were abolished and all their powers taken over by the Uganda Land Commission. Under the Public Lands Act, 1969, District Land committees were established but these Committees exercised no real powers; they simply played an advisory role to the Uganda Land Commission,

With the abolition of federal structures all official mailo estates hitherto held by Kings, Chiefs and other traditional rulers were vested into the Uganda Land Commission in freehold. But apart from this change the mailo system of land holding was left intact.³⁰

The Land Reform Decree

There was no change to the land tenure system until the Land Reform Decree of 1975. The Decree declared all land to be public land to be administered by the Uganda Land Commission in accordance with the Public Lands Act, 1969.³¹ All existing mailo and freeholds estates were converted into leasehold.³² The objective was to have a uniform tenure of leasehold which could be subjected to development conditions. However, since 1975 the decree has not been implemented at least as far as the imposition and enforcement of development conditions are concerned. On the one hand the 1967 Constitution provides that no law shall affect the continuance of Mailo land tenure; on the other hand the 1971 Proclamation made Decrees superior to that Constitution.

The other area that the Decree tampered with, is the relationship between the Mailo and Freehold landlords on the one hand and their tenants on the other. In the first instance the tenants were exempted from paying Busulu, Envujjo or any customary rents imposed by the Busulu and Envujjo Law, 1928, the Ankole Land Lord and Tenant Law and the Toro Land Lord and Tenant Law. Secondly, those laws were repealed.³³ This meant that these tenants were to occupy land

30 Constitution of the Republic of Uganda, 1967, Art. 126(1).

31 Land Reform Decree, 1975 S.1(1).

32 *Ibid* S.2(1).

33 *Ibid* SS.3(3)(i) & 3(4).

rent free. However, their security of tenure was greatly compromised since they now became tenants at sufferance.³⁴ Their tenancies could be terminated by giving them six months' notice and payment of compensation for developments on the Land.³⁵

The Traditional Rulers (Restitution of Assets and Properties Statute, 1993)

The confused situation brought by the Land Reform Decree remained largely in place undisturbed until the enactment of the Traditional Rulers (Restitution of Assets and Properties Statute), 1993.

The basic quarrel with the statute is its pre-emptive nature. The statute made an attempt at resolving issues which should have been made and are indeed the business of the Constituent Assembly. As regards land, it is disturbing to see official mailo estates that used to belong to holders of political office "returned" to cultural leaders having no political powers. Moreover, the smuggling back of the freehold tenure without discussing and if possible repealing the Land Reform Decree of 1975 has only brought more confusion. There are also issues to do with land that had been alienated away by the Uganda Land Commission – how is such land to be managed?

These and several other aspects of this statute should be re-addressed by the Constituent Assembly with a more sober mind. There is an element of uncertainty which should be cleared.

OUTSTANDING ISSUES

It is very clear that the problems created over the past nine decades in the land holding system have not been resolved by previous Constitutions and legislations. Indeed some of these enactments like the Land Reform Decree, 1975 and Traditional Rulers (Restitution of Assets and Properties) Statute, 1993 have compounded the problems. The outstanding issues are several but the following are considered to be the major ones:

- (i) Whether it is necessary to have a uniform system of land

34 *Ibid* S.3(2).

35 *Ibid* S.7.

tenure throughout Uganda.

- (ii) How to ensure fair and equitable distribution of land among all the people of Uganda.
- (iii) How to ensure that land is optimally utilised to create more wealth without causing much social dissatisfaction.
- (iv) Whether foreigners should have access to land in Uganda.
- (v) Which is the best institutional framework for the management of public land.

PROPOSED SOLUTIONS IN THE DRAFT CONSTITUTION

All the above major issues are discussed in the Report of the Uganda Constitution Commission.³⁶ The recommendations of the Commission constitute Chapter 17 of the DC. The striking feature of the proposals contained in the DC is that most of the crucial issues outlined above are not decisively resolved. Rather, the burden is pushed onto parliament to make appropriate laws to give effect to the very general principles and guidelines set out in the DC.³⁷ A look at the proposals will indicate whether adequate guidance to parliament to resolve the issues at stake were given. It will be necessary to examine the proposals regarding each of the identified issues one at a time.

Uniform System of Land Tenure

The Commission in its report recommended that land should be granted in freehold in rural and in leasehold in urban areas.³⁸ This would in the long run involve conversion of all land held under Mailo and leasehold tenure in rural areas into freehold. However, these particular recommendations are not reflected in the DC. What is proposed in the DC is that all existing tenure systems may continue in existence.³⁹ This proposition throws us back to the problem as to which tenures are “existing” in view of the attempt by the Land

36 The Report of the Uganda Constitutional Commission Analysis and Recommendations, Government of Uganda, UPPC, Entebbe, 1993 Chap. 25.

37 See especially Art. 171, 275 & 277 of the Draft Constitution.

38 Para. 25.69(b).

39 Art. 271(4) of the Draft Constitution.

Reform Decree, 1975 to abolish freehold and Mailo tenures and convert them into leases on conversion.

The issue is therefore left unresolved. Indeed the DC makes provision for parliament to revisit the issue.⁴⁰

It is my argument that there is no need for a Uniform Tenure System. What is important is security of tenure to those occupying and utilising land. A system that offers a variety of tenures is flexible and can satisfy the aspirations of different groups of people. Specific laws can then be enacted to cater for specific problems inherent in different tenure systems. For example, we may need a Land Lord and Tenant Law to regulate relationship between Freehold/Mailo owners and Bibanja holders. There will also be need for strong planning legislation to ensure that owners of Mailo/freehold land especially in urban areas put it to good use. Specific legislation can also deal with the aspirations of holders of leasehold land to have security over the developments made on land. This may lead to a multiplicity of legislation but it is inevitable and the only alternative to enforced uniformity, which may in any case be difficult to implement, is demonstrated by the failure to implement the Land Reform Decree. It is no use having one comprehensive code, many parts of which are not functional.

Fair and equitable Distribution of Land

The Constitutional Commission recommended and proposed that all persons lawfully occupying and utilising land should be guaranteed security of tenure and be enabled to register their interests and acquire Certificates of Title in accordance with the Law. Secondly, there should be maximum utilisation of land while ensuring equitable distribution of land among the people.⁴¹

The task given to parliament to translate the above principle into law is not an enviable one. The first problem is to determine who is “lawfully” occupying and utilising land. A strict legal interpretation would leave several hundreds of people as trespassers especially on

40 Art. 271(5) & 277(a).

41 Art. 271(2) (a) & (b)

Mailo/Freehold land. Thus the only people to be protected would be genuine Bibanja holders.

The other problem is to determine the extent of occupation and use. Most peasants use less than 10 acres of land and yet they may lay claim to a bigger acreage. Should they be guaranteed security of tenure to the land they are physically occupying and actually utilising or should the security of tenure extend over the land to which they have customary claim?

Perhaps the most difficult principle to translate into law and practice is that of equitable distribution of land. Most of the land in Uganda is actually occupied or claimed by people. If the first principle is to be implemented, then all those in possession will have to be facilitated to acquire Certificates of Title over their holdings. Since the present sizes of land holdings are not standard, some people will end up having more land than others. Indeed some people today are landless. The problem is how to equitably distribute land between those who have and those who do not have. Reallocation of land will certainly violate the principle of guaranteeing security of tenure to those in possession.

The practical alternative which may not necessarily be equitable would be to guarantee security of tenure to those currently occupying or utilising land or having verifiable claims to the same provided such claim is not in conflict with the claims of a registered proprietor or one physically occupying or utilising land. This will preserve the status quo in terms of land occupation and utilisation. To ensure that the landless have access to land, legislation and appropriate economic and administrative measures will have to be put in place to enable the landless purchase land. The state may have to buy land and resettle the genuinely landless and the poor.

Maximum Utilisation of Land v Social Disruption

Related to the issue of equitable distribution of land, is the question how to ensure that land is put to maximum use without occasioning social disruption. This becomes an issue because it is generally accepted that in economic terms, there are economies of scale to be reaped if production is on a large scale. This would mean

that the average size of land holdings should be large enough for viable agricultural or industrial production. The problem is that the bigger the land parcels, the fewer the owners. As more and more land is consolidated more and more people are made landless. The issue is how to strike a balance between economic sense and social requirements.

The report of the Constitution Commission recommends sizes of land holdings should be subject to control and limitation. Details of criteria to be followed in achieving this are given in the report but are unfortunately not included or remedies therefore abstracted in the DC.⁴²

In the short term, it may be feasible to restrict the maximum size of land holding but I take the view that the way forward is to liberalise the land market. We can begin with a position where the majority who are today peasants living on the land have access to the land.

This can be achieved by guaranteeing them security of tenure over their holdings and claims. This will satisfy equitable aspirations. In any case today we do not have that army of rich people capable of managing large scale farms/industries.

However, as the economy grows and better technology is acquired, we should tread carefully the path of land consolidation where the rich will buy off the poor from the land and establish viable large scale farms or industries. Put blatantly, the economic future of this country does not lie with fragmentation of land between poor peasants for the sake of equitable distribution but with land consolidation and the emergence of a truly wage earning class freed from the land.

Foreigners' Access to Land in Uganda

The existing Land Transfer Act which regulates acquisition of land by foreigners looks at them in racial terms. The restrictions is imposed against Non-Africans.⁴³ As long as one is not born of

42 Compare Para 25.72 of the Report with Art. 271(2)(c) & 277(d) of the Draft Constitution.

43 See S.2 of the Land Transfer Act, cap 202.

Ugandan African parents, even if one were a citizen he is considered a non-African and discriminated against.⁴⁴

Fortunately the DC has correctly changed its focus and now looks at the issue from a citizenship point of view. However, we should guard against dual citizenship. Non-citizens the world over do not enjoy the same rights and privileges as citizens. This position is even more easy to defend when it comes to a vital resource like land. The gist of the recommendation of the Constitutional Commission that a non-citizen should only have access to our land if he satisfied well defined conditions⁴⁵ would be agreeable not only on a show that he has immediate plans for putting the land to proper and productive, use and that he will develop it in accordance with an approved plan; but it is difficult to rationalise the necessity for him to be supported by three prominent and respectable nationals of Uganda as proposed by the Constitutional Commission. There are hundreds of prominent Ugandans but very few of them are genuinely respectable. This proposal is a panacea for corruption and thank God it was not reproduced in the DC. To ensure that the foreign investor complies with the conditions of the grant of land to him, it is proposed that only clearly drafted leases and not freeholds of Mailo grants should be given to foreigners.

Before I take leave of this subject of foreigners the issue of nationalities within Uganda is relevant. There is a growing tendency these days for people to think of themselves in terms of regions or tribes or districts from which they come and in a sense to look at people from other areas as “foreigners”. This is in spite of the so-called sectarianism law. There are voices in some parts of Uganda against people buying or acquiring land outside their tribal areas. These are the kind of pressures that can lead a nation to disintegrate and some thought should be given to this matter. Is it okay for a Muganda to buy land in Teso or for an Etesot to buy land in Ankole?

44 The most painful of such a situation occurred in *Kawalya Kagwa v Registrar of Titles* Civil Appeal No.38 of 1974.

45 Para. 25.93 of the Report.

INSTITUTIONAL FRAMEWORK

The case of institutions to hold and administer land is obvious. The issue to be resolved is which institutions are necessary and how should they be constituted. This question will have to be resolved together with the issue of whether Uganda is to remain a unitary state or go back to a federal arrangement or some other hybrid state.

The proposals in the DC do not quite fit a unitary state nor do they answer to the aspirations of the federalists. They fit within the framework of a decentralised unitary state and it is for that reason that they are confusing.

It is proposed in the DC that all land in Uganda belongs to the people and its use be regulated by the Uganda Land Commission.⁴⁶ The appointment of the Commission is proposed to be made by the President on the advice of the National Council of State, a controversial body whose establishment is also embodied in the draft.⁴⁷ The functions of the Land Commission include allocation of land.⁴⁸

The problem is that in the districts, the functions of the Uganda Land Commission shall be entrusted to District Land Committees.⁴⁹ Since each district will have a Land Committee, one wonders where the Uganda Land Commission will exercise its powers. Its only role will be to coordinate the activities of the District Land Committees.⁵⁰ Such an amorphous role is not befitting such a highly placed body. However, as long as Uganda is a unitary state, the existing arrangements under the Public Lands Act, 1969, where District Land Committees play an advisory role to the Land Commission, is adequate. Secondly, like for all other presidential appointments, the appointment of the Chairman, and members of the Land Commission ought to be approved by an elected Parliament and not the National Council of State or any such organ.

46 Art. 271(1).

47 Art. 272(2).

48 Art. 273(a).

49 Art. 274(1).

50 Art. 274(2)

If Uganda is to revert to the federal structures that failed in the past, the structures under the 1962 Constitution outlined earlier are clearly adequate.

There are serious reservations on Land Tribunals as proposed in the DC. They cannot competently resolve complicated land disputes and it would be preferable to strengthen the ordinary judicial system to deal with land disputes.

CONCLUSION

The above discussion clearly shows that the subject of land is a delicate one. The failure to resolve land issues can lead to instability and possibly the break up of a nation. On the other hand if the subject is maturely handled it can be the basis of stability and development. When discussing the subject there should be no recourse to theoretical or revolutionary approaches. What the challenge calls for is an appreciation of the social, economic and political realities of the situation and the adoption of evolutionary solutions. There is need to stabilise the current volatile situation by guaranteeing security of tenure to the largest number of people possibly before the market can be gradually opened up to meet future developmental strategies. While the details of the strategy cannot be put in the Constitution, its provisions should give clear guiding principles to the legislature. This calls for scrutiny of the DC and careful redrafting of all the provisions relating to Land.

CHAPTER VII

TAXATION, SPENDING POWERS AND CURRENCY REGULATION

By RICHARD OKUMU WENGI

INTRODUCTION

This chapter concerns itself with the Constitutional protection of the taxpayer in relation to governmental powers of taxation, spending and currency regulation.

It is my understanding that the monetary sector has greatly penetrated the traditional or subsistence sector and that the money economy in Uganda has thus expanded to an increasingly greater extent than it was at independence in 1962. This is clear even from the failed attempt to propel barter trade to bolster export earnings, when the cash crop economy in Uganda suffered a severe setback. Taxation itself then represents the state drive to monetise the economy since all taxes are levied in money terms. Therefore the subject of taxation assumes greater significance in so far as it impacts on the taxpayer. This then raises the issue for the possible democratisation of the taxing process through the Constitution.

The second aspect will focus on the spending powers of the Executive State and its accountability to the taxpayer. This is in terms of management of the consolidated fund, and the public debt as well as external loans. Spending covers government expenditure generally but can also be interpreted to include alienation by the state of public assets, which the taxpayers see as their own. It is our contention that alienation of public assets such as public buildings belonging to National Housing and Construction Corporation and government pool houses as well as properties expropriated from the Asians is crucial since it represents a massive alienation on a scale comparable in reverse order, only to the 1969 nationalisations and the 1972 expropriations. When this alienation includes industries, agricultural estates, commercial buildings as well as hotels and so on,

questions as to the physical beneficiaries and the actual principals are posed. Also relevant is the manner in which the revenue realised is managed and extinguished in light of the rights of all peoples in all the different regions of Uganda who have the inalienable vested rights in these properties or revenue generated by their jumble sale. In this regard, concern is justifiably raised if the Minister in charge of the Public Enterprises Reform and Divestiture Secretariat (PERDS) can direct PERDS to transfer UGX. 600 million to NYTIL without legislative authorisation. This is exacerbated by the fact that the loan directive in July 1994, was accomplished without authority and the credit is unsecured yet NYTIL is due for sale through divestiture.

One is also cautious in assessing the extent to which the Executive state is poised to espouse for the emergence of a middle class supportive of its policies, and how this resolve can be executed with equity. Who will constitute this privileged middle class? Can this class emerge equitably and can the revenue from sales of public assets be protected and applied to take care of regional reparations in proportion to the contribution of each regional economy in Uganda apportioned in line with colonial zoning laws? Possible systematic balanced reinvestment or capital expenditure from the revenue accruing from the sales of public assets can however, become remote, in a democratic vacuum.

FREEDOM

The whole subject then revolves around the question: How can the Constitution entrench the rights of the taxpayer in relation to the government, its spending practices and acquisition or alienation of public property. In an address to the Constituent Assembly, the President admonished the CA delegates to design and promulgate a Constitution that according to President Museveni, will:

give freedom to the direct producers of wealth, namely, the peasants, the industrial workers and industrialists, the artisans and workers in the service sector.

As it happens, the persons, envisaged by the President, are the tax payers in this country. Indeed he deliberately limited his emphasis to this group, which is clearly narrower than the conception of the

“citizens” and the “population”. They are also distinguished from and not classified in terms of gender or sex. The direct producers of wealth comprise all the latter classifications and are a dynamic class whose productive enterprise gives rise to the wealth of the nation. They are workers irrespective of sex, age or geographical and ethnic distinctions.

What freedom is therefore envisaged and in particular what type of freedom does the taxpayer deserve? The answer to that question is that there are two fundamental freedoms that we envisage; the first one is the substantive and fundamental freedoms and rights recognisable in terms of freedom of association, that is to say, freedom to assemble, to form political and interest groups, trade unions, and to receive and impart ideas that are of interest to the different groups who are the taxpayers. The second is the procedural freedom that encompasses the process of democratising the exercise of those substantive freedoms as well as in restricting government excesses in taxation, spending and currency practices. In this regard one may say that granting of freedoms on the basis of sex, (read women), age set (read youth), and residence is not a substitute. Indeed it may undermine the freedoms as the interests become physiological and geographical only; such grant is only subsidiary and supplementary and is not based on free association but predestiny. At the outset, therefore, organisation or association based on gender, age set, and so on, appear sterile when considering the issue of Constitutional freedom. Special considerations of gender inequality may justify sex based empowerment, but such action is merely positive discrimination in the emphasis of freedom to the female taxpayer. In examining the quality of Constitutional freedom regard must be had to Equality before the law and Equal protection of the Law. This too depends on the institutional checks and balances that ensure the genuine protection of these freedoms.

CIVIC PROTEST AND TAX

Civic reaction to taxation excess in Uganda is not a new phenomenon. In 1960, at the height of the Independence movement, a fierce civil

war burst forth in the Bukedi District in Eastern Uganda.¹ The civic vigilantism was directly evoked by excessive taxation and cruel tax collection practices of colonial chiefs. The multi tribal district at once rose up in unison from Pallisa in the North through Kisoko to Dabani/Lumino in the South. Thousands of spontaneous armies marched through the villages, burning and destroying property of targeted colonial chiefs. The colonial government acted brutally. It immediately deployed troops throughout the district and mercilessly quelled the riots. Hundreds of alleged ring leaders were arrested and detained. It was the independence government, once in power, which released all these patriotic persons who had been sentenced to life imprisonment by the colonial regime as a result of the riots.

Tax related riots have time and again been reported, the most recent of which have taken place in Busiki, Iganga. A similar upheaval was reported in Busoga in 1984. Moreover, the phenomenon has not been restricted to the South Eastern corner of the country but widespread.² Other protests have been reported in Mubende, Apac, Lira, Masindi, Ntungamo and other districts in recent months. At the national level, the issue of high taxes levied on business by way of a mandatory deposit prior to commencement of business received considerable attention at a meeting between the President of Uganda and the Ugandan Business Community.³ The meeting also demanded payment by government for credit supplies of goods and services obtained from the business community, denounced harsh tax collection practices and lack of accountability for taxes collected by the ASU or Uganda Revenue Authority. The businessmen further demanded that a sound method of accounting be established to ensure transparency. A similar protest was recently chorused by oil companies following the apparently sudden ad hoc hike in taxes for oil products.

1 The uprising was in the Dhopadhola language popularly referred to as “Lweny Abiro”. named after the weaponry used, namely, clubs.

2 See Ndinawe Byekwaso: “The Iganga Tax riots. A social protest or CA motivated?” Daily Topic Assignment, 94, Monday, 7 February, 1994.

See also Weekly Topic, 5 February, 1994 “Mubende rejects New Taxes” by Olive Birungi.

See also New Vision 10/12/94 Thugs burn sub county office.

3 Monitor 22-25 February 1994 “President takes Mutebile to task”.

Can this tendency be contained or neutralised altogether? It is our suggestion that the new Constitution may provide some solutions. This radical recourse is deliberately taken only because the recent practice is that the state levies and collects taxes without recourse to the Law. Thus in 1993, for example, no statute was put in place to authorise tax collection as estimated in that year's budget and debated by the NRC.⁴

Society must first recognise the dangers associated with riots which would otherwise be resorted to in the absence of clear cut definitions of the confines of state power to impose taxes as well as the guaranty of avenues for the citizens to voice their tax complaints.⁵ Following the widespread protests, government is said to have established a Commission to grapple with the graduated tax problem. On the other hand, failure to establish and operate tax appeals tribunals was unforgivable. It must be appreciated also that the tax issue encompasses many aspects of public management. According to the Finance Bill No. 13 of 1994, an Appeals Commissioner will be appointed to dispose of tax appeals.⁶ It is understood that such Commissioner of Appeals will be operating under the aegis of the Inspector General of Government. Such an institution, though further distancing the taxpayer from the protection of the courts, is better than having no remedy in theory.

CONSTITUTIONAL CONCERNS

What then are the Constitutional concerns, if any, in relation to government's power over taxation, spending and currency? Chapter 9 of the 1967 Constitution makes provision relating to public finance. A consolidated fund is created by article 92 therein and spending procedures or appropriations laid down in general terms in articles 93-95. The Constitution by article 99 defines public debt merely as a charge upon the consolidated fund and establishes the position and function of the Auditor General. Article 100 enables the government of Uganda to pay to each district and urban authority

4 See Isaac Musumba: An updated Income Tax Decree 1974. Monograph (1993).

5 See also Daily Topic 22/2/94 "Curse Parliamentary URA".

6 Section 23.

a contribution towards the costs of administering such District or area. The above provisions all relate to spending.

The provisions of the Constitution in relation to public debt has left open executive indiscretion in matters of credit and loan transactions either in the form of foreign loans or contracting massive local debts by government departments from the gullible business public. At the international level, borrowing has been indulged in without any Constitutional restraint let alone regard to statutory ceiling.⁷ Many times, this is done on the pretext, that the law is a mere formality which follows political and critical economic decisions. The net result has been a mortgaging of the earnings of posterity and an incapacitation of development potential through a killing debt. To make matters worse the contracted loans are often dissipated on consumer goods and luxury services or drowned into inferior capital goods. In all this, statutory enactments regulating public finance and external loans have proved inadequate and will require energisation by the new Constitution. It is our argument that the state has used loopholes in the 1967 Constitution to tax without reciprocity and to exercise, spending powers arbitrarily while manipulating currency to the taxpayer's disadvantage.

On the domestic scene, local businesses have been crippled by the arguably intentional withholding of payments for credit supply of goods and services to government departments. A local company that supplied furniture and goods to a government department was not paid in several years leading to a severe devaluation of its capital and indebtedness due to colossal interests on bank loans it took to procure raw materials and inputs. At first, the practice facilitated corporate cleansing to submerge businesses that were blacklisted. But even the current payments to local suppliers in the form of treasury bills has enabled government to create fiduciary money by delayed maturity of the bills which it spent fuelling inflation and providing graft possibilities for those in strategic executive positions. The failure of the 1967 Constitution to exert sufficient checks on the Executive in this respect is directly responsible for the inflationary expenditure by government departments.

7 E.W Jjuuko: *The Role of Law in Development*, Uganda Law Society Review, 1992 Vol 1 No. 2, 150

But perhaps the most significant omission in the Constitution is related to the question of taxation and its relationship to entitlements and rights to demand representation and accountability. The 1967 Constitution neither makes reference to any powers of government to levy tax nor categories thereof. The question of representation in relation to taxation therefore does not feature and instead when demarcating constituencies arbitrary geographical or political constituencies have in the past been used relying on certain poll or hut based estimations. The impact of this has been disproportionate representation leading to democratic distortions.⁸ In some instances, politically carved districts have reaped more representation outside any genuine entitlement if taxation had been used as the basic determinant. This automatically undermined the essence of genuine political and democratic exercise of power and representation. The right to make demands otherwise endowed by tax obligations gets alienated leaving discretion to enforce tax collection and to spend public funds without any regard to the natural rights that ought to flow with tax obligations. It is true that one of the reasons for the low revenue collection ratio to the GDP is the hostile attitude people harbour towards tax obligations leading to the mischief of rampant evasions. This hostility, however, is also traceable to the lack of accountability for tax revenue by those charged with its collection as well as those responsible for exercising the spending powers conferred by law. This consumption directly evokes a general disdain and natural hostility as well as persistent suspicion especially when social services have been deprioritised and transformed into increased direct taxation in the form of cost sharing for health services and education at University and lower levels.

The traditional justification for and moral authority to levy taxes became considerably dilute as shown by T.V commercials of the Revenue Authority aimed at coaxing voluntary compliance with tax obligations which remain fictional, attracting little credibility. Moreover, the manipulation of spending powers to undermine the Authority of the taxpayer has been generally practised. A glaring instance concerned the omnibus issues of vehicles to NRC

8 Dr. Tumwine Mukubwa: "The Constituent Assembly Statute: The Salient Features." The People, 28 July 1994.

members. These subsidised vehicles arrived and were parked outside Parliamentary Buildings around the eve of the endorsement by NRC of the extension of their own tenure for a further five years. Moreover, several officials in government were the beneficiaries of over subsidised government vehicles and public buildings under the so called co-ownership scheme. All this should be seen in light of the burden on the tax payer in terms of both direct taxes as well as indirect taxes for which public companies such as BAT have-been commended.⁹

SOME COMPARISONS

A look at the American Constitution shows that it contains detailed provisions regarding the Constitutional limits for levying tax as well as congressional power over the same. The Fiscal powers of congress as well as spending and money regulation are all stipulated. Article one of the US Constitution directly relates taxation to political representation and mandates congress to lay and collect direct tax and excise and creates powers over coinage and control over the value of money. There have been judicial decisions that have struck down improper tax Acts of congress like the retroactive legal tender Acts affecting currency which have been held to be unconstitutional. Congress is also granted a general authorisation to tax and spend revenues only for the general welfare. Detailed Constitutional provisions and judicial dicta have for example resulted in taxes exacted for the purpose of prosecuting criminal activity, compliance with which necessitated self incrimination, being held unconstitutional as violating the fifth Amendment. For example tax imposed on gamblers, payment of which required a tax payer to confess to the crime of gambling has been held to be invalid.

In other words, the United States Constitution and its Supreme Court show how taxation, spending powers and money laws are of paramount importance to a country. The tax payer is endowed with real authority which emanates directly from his tax obligation, compliance with which is executed with honour. Indeed dishonesty by the state was readily censured by the U.S Supreme Court in the

old case of *Chisholm v Georgia* (1793).¹⁰ In this case a South Carolina merchant made supplies to troops in Georgia, which subsequently refused to pay its debt despite repeated requests until the merchant died. His administrator was able to move the Supreme Court to enforce Chisholm's Rights.

There have also been instances where US states were sued to question the power to dispose of tangible property and to exercise other general spending powers. This has given rise to the so-called taxpayer suits that have been responsible for the development of the rules of standing to sue in American Constitutional Law. The importance of taxpayer rights to hold the state to account can be seen in relation to the currently ongoing programme of government in Uganda to sell public buildings and enterprises by statutory enactments not limited by Constitutional provision. In the Pepsi Cola sale, private property in shares owned by individual tax-payers was expropriated in violation of the Constitution and sold off without compensation. Such a practice would normally have been denied judicial endorsement as the 1967 Constitution including its chapter on fundamental rights and freedoms, clearly protects the right to property and against deprivation. But looked at in light of the 1972 expropriations, the unthinking mind might see this as negligible. The current position of the Constitution apparently bestows upon NRC the power to deprive a taxpayer of his property or fundamental right by ordinary legislation or by implication.¹¹ Here then lies the fundamental problem where important areas of power, are left outside Constitutional limitation and control. The Supremacy of the Constitution must not only be secured but must reflect the sovereignty of the voter, the taxpayer in order for him to exert checks on the executive. This can only be achieved by further emphasising the fundamental rights and freedoms of the producers of wealth.

THE DRAFT CONSTITUTION

A look at the Draft Constitution (DC) indicates that new provisions have been made relating to taxation and spending powers of government. Chapter Eleven thereof little more than replicates

10 See Sheldon Goldman: Constitutional Law cases and essays, 2nd edition, 1991 p. 169.

11 See *E.F Ssempebwa v Attorney General* Constitutional Case No. 1 of 1986

Chapter 9 of the 1967 Constitution. It attempts to mandate the issuance of currency and maintenance of its stability. It is an improvement whose important additions indicate a step in the right direction.

Article 178 in the DC provides that “No tax shall be imposed except under the authority of an Act of Parliament”. This corrects the existing vacuum as “the Crown does not tax by analogy but by Statute” *Ormond Investment Co. v Betts* (1928).¹² The DC further restricts delegation of taxing powers under any law by the prior approval of Parliament. While entrenching parliament’s powers, the DC also enjoins the President to submit to Parliament fiscal and monetary programmes for economic and social development. This would appear to take care of situations such as those that preceded the IMF programmes. But a provision in article 146 of the DC to the effect that only the President may introduce a bill imposing tax is self-limiting.

However, the relationship between taxation and representation has not been explicitly provided for and this omission has the effect of alienating the taxpayer from directly shifting the levers of power that his tax obligation bestows upon him. If this were remedied then all taxing statutes will have to comply with the broad provisions of the Constitution that recognises the power of the taxpayer.

It is worth recalling the amounts in taxation that we are referring to. It is argued that the tax collection figure is only a small percentage of the total collectable tax and an even smaller percentage of the GDP. Regarding poll tax, it has recently been disclosed that Kitgum district, for example, yields a mere UGX. 500 million per year in tax revenue. This compared to UGX 33 billion paid annually by BAT prompted the policy “to have 100 BAT’s” in the country. In the first place the impact of poll tax/graduated tax revenue on the overall tax collection, needs to be reassessed. Indeed in Tanzania this was done with the result that poll tax was abolished. It is equally important, to consider the producers of tobacco in West Nile and the smoking public in Kitgum and elsewhere to arrive at the correct

12 [1928] AC 143.

tax contribution of BAT. Moreover, the disease burden associated with the BAT industry could outweigh its tax collection efforts.

In order to render the censure by the taxpayer effective, his position must of necessity be entrenched by Constitutional provision. Representation must be on the basis of authentic democracy related to taxation and tax collection and assessment procedures must be equally democratised. Beyond mere decentralisation, the taxpayer must be empowered to enable him directly provide for his own economic security. When discussing tax practices it should be recalled that 200 years ago the USA experienced similar difficulties. During the confederacy, taxation and currency was a nightmare across the land. Each state imposed its own taxes, and printed its own money to pay veteran soldiers and creditors and to settle debts between small farmers and large plantation owners. This very chaos prompted the Constitutional convention.

CURRENCY PRACTICES

Prof. F.E. Ssempebwa has stressed that both political and economic stability are preconditions for development. He singled out as an example the disruptive economic policy of currency manipulation. Evidence of pursuit of such a policy by post independence governments dates back to 1966 when the East African Currency Board broke up and each of the three East African States set up their separate Central Banks and currencies. Ever since then, each government in power has left it's own mark on the Ugandan currency, manipulating its parity to the dollar. The effect was to create a speculative currency market (kibanda) which served as a reservoir of state largesse, subject of allocation. It may, however, be noted that the gap between the Uganda shilling and the dollar, has since the 1979 Liberation War grown faster by leaps and bounds. The 1984 IMF/IDA arrangement which introduced the multiple currency exchange system (two windows) to manage a floated shilling, did not benefit the country as the importation of industrial raw materials and emergency spares was limited in scope to a consumption strategy that built up the country's indebtedness.¹³ But even worse effects have

13 Jennifer Okumu Wengi (Mrs). "Legal and Social Aspects of the IMF Programmes in Uganda", University of Warwick, Coventry, U.K., 1991.

been registered by the 1987 currency feat.¹⁴ The two zeros removed then have come back and the continued doctoring of the dollar rate by the Central Bank has left the economy with a fiduciary growth rate amidst increasing impoverishment of the population. The result has been compounded by the printing of currency the last of which was accomplished on the eve of the CA elections, when the 5000 shillings denominations were released. Many candidates were able to spend millions of shillings, issue out bicycles, bicycle tyres, soap, salt, sugar and cooking oil in their campaigns. The idea of regulating campaign spending in Uganda is apparently alien.

In 1987, the state entered into far reaching agreements with the IMF which imposed on the country economic and fundamental consequences without prior reference to the legislature. This is so in so far as only the currency reform part and not the total IMF package was submitted for public and legislative scrutiny and sanction. By the stroke of a pen, for instance, the value of money was in 1987 slashed down by removal of two zeros on top of a 30% conversion tax.¹⁵ If one had in his possession the sum of one hundred thousand shillings, this was at once reduced to UGX.700. Inflationary practices that followed further tended to deplete the real value of this money. Money values had been successfully manipulated by the state to favour the emergence of a supportive elite, a new crowd of the middle class that would be set to control the country's economic, political and legal order.

Through the currency fluctuations the values of earnings by the direct producers of wealth could not be guaranteed. The floating of the shilling facilitated the devaluation of the currency and undermined the value of labour as well as export potential. The subsistence economy was similarly weakened as food crops were carved into the barter trade adventure. This taken together with the civic chaos that ensued destroying the subsistence economies in large parts of the country was the recipe for famine.

As we have stated earlier, a Currency Reform Statute was passed, which effect had the impact of legalising the taxation of the

14 Statute 2 of 1987.

15 Op.cit.

two zero value from the people. This law has not been challenged for its validity perhaps in view of the fact that continued inflationary practices recalled the two zeros lapsing the effect of the law. But viewed as a taxing statute with retrospective effect, its promulgation was surprising, easily accomplished. This was facilitated by the absence of the necessary Constitutional limitations to the taxing powers of government. The two zeros feat was a *de facto* tax in disguise, which the 1967 Constitution did not envisage.

JUDICIAL REVIEW

The significance of currency law needs proper analysis by others but suffice it to say that mortgages life or other insurance policies and bank balances or debts were seriously affected. The inflation which followed the two zeros taxation only appears to have greatly benefitted those who accessed the banking systems and reaped rebated loan status after acquiring substantial assets without payment of appropriate capital gains tax. That was perhaps the beginning of the creation of a tax haven in Uganda for its own selected middle class elite. The 1991 Foreign Investment Code introduced new avenues into this tax haven not accessible to the masses or the ordinary taxpayer by providing for discriminatory incentives to ostensibly sanctified foreign investors.

The Currency Reform Statute has been the subject of some judicial decisions. In *Donatus Alewi Janyare v Attorney General*¹⁶ the Judge rejected the removal of two zeros in a compensation claim on the ground that subsequent inflation had defeated the intention of removing the two zeros. The learned Judge H.E. Okalebo found his way round the offensive law. In another case, *Dr. Lwamafa v Attorney General*,¹⁷ the High Court ignored the currency reform law in arriving at compensation in an accident which occurred in 1983 and damage assessed prior to the coming into effect of the two zero taxing statute. The Judge held that the doctrine of *restitutio in integrum* required that the intricacies of the Currency Reform be ignored.

16 Civil Suit No. 1049 of 1988.

17 Civil Suit No. 79 of 1983 Reported in [1992] KALR 21.

It would thus appear that the High Court adopted a pragmatic approach to circumvent the salient injustice brought about by uncontrolled devaluation of the currency. The decision of the Supreme Court in *Zaituna Kawuma v George Mwa Lurum* (1992)¹⁸, however, held that the Currency Reform Statute was not a devaluation but a statutory reform of the currency. But it is our submission that the currency reform exercise exerted a devaluation effect and the par values of the currency to the dollar started off and registered a devaluation which continued from new UGX 60 in 1987 to about UGX 1,000 in 1992-94. The Supreme Court did not exhaustively deal with the issue of the value of currency and the case was decided in light of the unlawful transaction which gave rise to the suit. The court did not also tackle the question of 30% currency conversion tax which reduced the refund to UGX 4,800 and not UGX 6000 as the court awarded. It is thus contended that the slip rule could be further invoked to correct this award.

SPENDING POWERS

The 1967 Constitution concerned itself with creation of a consolidated fund which presupposed a steady inflow of resources then ensured through the design of the colonial economy. The Constitution did not define how government could “raise” moneys or revenues and subsequent governments went ahead and printed money outright, and in some instances purported to raise loans from the banking sector secured in advance by revenue from expected sales of public buildings such as Custodian Board or expropriated properties etc. The consolidated fund, in its present form is still a colonial treasury fund whose existence is not authoritative and does not emphasise investment but relies on some times, fiduciary sources of revenues. When the Madhvani Group paid to the government UGX 500 million as compensation for alleged government investment in Nile Breweries Ltd. the cheque was subsequently banked in a private account in a private Commercial Bank. A similar fund, the contingency fund is also provided for and the Constitution only enjoins the Minister of Finance to lay before the National Assembly estimates of revenue and expenditure including supplementary

18 Civil Application No. 3/92 [1992] KLR III p.26.

estimates all of which give rise to a general authorisation to spend. Indeed in the 27 years of the existence of the 1967 Constitution, these estimates have been wild wishes of expected revenues on which the country's successive budgets have been based. The result is an authorisation to spend as a result of which civil servants have raised local purchase orders for supplies leading to the notorious air supplies and an ever increasing indebtedness of government departments to the local business public. This enlargement of the public debt is further facilitated by the authorised deficit budget which is a licence to government bureaucrats to contract large debts.

A stalemate at the level of revenue options leaves the consolidated fund without a viable replenishment mechanism and this lethargic scenario, exacerbated by the lack of control or limits to the outflow, have left it perpetually in the red. Moreover there is no ethical restraint that limits government spending from the consolidated fund to the requirement that expenditure must be only for the general welfare. This doctrine is clearly alien to the Constitution and other Finance Laws and Practices.

The treasury is therefore mandated to finance expenditures not governed by the General Welfare principle. This has led government into conspiratorial expenditures such as co-ownerships of public vehicles and pool houses and other public buildings for its senior civil servants in spite of the fiduciary position in which they stand in relation to the taxpayer. At the other extreme, the public is subjected to the further impact of cost sharing for social services and a subsistence judiciary in the form of RC courts and an under-funded formal court system.

SOME CONCLUSIONS

Official respect for law is a cardinal premise in governance. The sacrosanctity of the Constitution is not an optional matter and with this the position of the courts as the guardian of the Constitution cannot be trivialised and treated with disdain. Even the political questions doctrine that sometimes favoured another branch of government to solve a particular dispute was in its heyday a matter for the court to determine. To revive it as an escape from the courts' authority is itself an aspect of mischievous governance.

In view of the foregoing, it is an understatement to assert that a gross error was recorded when no Finance Statute was enacted for the 1993 financial year. The Finance Statute, 1993, was assented to only on 20 July, 1994. This means that for one whole year taxes were collected outside statute beyond the four months authorised by the provisional collection order.

The statute then authorises retrospective taxation. The Finance Bill, 1994, itself dated 16 June 1994 provides that the new bill, 1994, shall come into force on 17 June 1994. Although the 1993 tax holiday was not real the patriots whiled it away in high spirits. But the reality cannot be wished away.

CHAPTER VIII

THE JUDICIARY AS THE GUARDIAN OF THE CONSTITUTION

BY GRACE TUMWINE MUKUBWA

INTRODUCTION

The Draft Constitution (DC) makes an attempt to incorporate a strict separation of powers by creating three co-equal organs of government. These organs are the executive, the legislature and the judiciary. The justification for separation of powers has been stated in simple language by the Uganda Magistrates Association:

When the legislature and the executive are united in the same person, there can be no liberty. The idea is that laws may be passed which will be tyrannical and will be executed in equally tyrannical manner. It is worse if the judiciary joins in. Then the life and liberty of the individual will be exposed to arbitrary control for the judge will then be a legislator. Once this happens the judge will behave with violence and oppression. That would be an end to democracy.¹

For this reason the Magistrates Association advocated that the doctrine of separation of powers must not be diluted.² In other words the separation of powers between the executive, legislature and judiciary is intended to safeguard the liberty of the individual. The courts should be given independence by being left free to arbitrate on disputes without interference from other state organs so as to ensure efficiency and a fair administration of justice.³

The DC contains the necessary provisions by which the judiciary is the only organ to authoritatively interpret the constitution. Thus article 75 provides that any person who claims that a fundamental right or freedom guaranteed under the Constitution has been infringed

1 UCC/1991/M298 p.3.

2 *Ibid.*

3 UCC/191/M43 Para 14.6.

or threatened, can apply to a competent court for redress. And article 168 states clearly that “any question as to the interpretation of the Constitution shall be determined by the High Court”. This power extends to challenging Acts of Parliament, anything done under the authority of any law and any act or omission by any person in authority. There is also a declaration in article 158 that in the exercise of judicial power the courts shall be independent and not subject to the control or direction of any person or authority. It also contains an injunction that no person or authority shall interfere with the courts’ or judicial officers in the exercise of their functions.⁴ These provisions are in line with the preponderance of memoranda on the judiciary.⁵ It appears that for the doctrine of separation of powers to be effective, the three organs of government must have a degree of independence from each other.

AN INDEPENDENT JUDICIARY

It is beyond debate that an effective administration of justice requires an independent judiciary. Such independence is also important if the courts are to act as an effective check on unconstitutional acts of the executive and the legislature. This implies that the judiciary must be free from interference from either the executive or the legislature in the exercise of judicial functions.⁶

Independence of the judiciary is intimately linked to the rule of law. The rule of law demands that people and especially those in authority should act according to established principles of law. And whoever deviates whatever his or her position must be punished by the appropriate authority.⁷ But is independence of the judiciary possible given the fact that the executive arm of government has always interfered with the judiciary?⁸ And the courts are widely perceived as being unwilling to take stands against the executive, especially in Constitutional and human rights cases.⁹ There is also

4 Article 158 (2).

5 See *Inter alia*, UCC/1991/M2678, UCC/MBR/RC3M/023 UCC/1991/M2981, UCC/1991/M43, UCC/MOY/RCIM/O12 UCC/BUS/RC2M/100.

6 Odoki Report para 17.37.

7 Odoki Op.cit - para.17.38.

8 Odoki Op.cit - para 17.24.

9 *Ibid.*

the problem of enforceability of court judgements. As the law society observed:

...only a small number of Ugandans took legal action against the government but in most such cases, even where successful, litigants were not able to enforce payment of their awards.¹⁰

Enforcement of judicial decision is by the executive, which controls finances and the coercive machinery of the state. Therefore, if the executive refuses or neglects to enforce judicial decisions there is not much that the courts can do. Moreover, the courts are generally reluctant to give judgements that cannot be enforced. So if it is known that the executive will not enforce a decision the courts will not give it. And yet the Draft Constitution does not address this issue. A provision on the lines of the Namibian Constitution would be appropriate. article 78(3) states in part “all organs of the state shall accord such assistance as courts may require to protect their independence, dignity and effectiveness”.

The independence of the judiciary may also be undermined by the manner of appointment and removal of the members of the bench.

APPOINTMENT

It has been suggested that in order to strengthen the independence of the judiciary the Chief Justice and other Judges should not be political appointees but must be appointed by an independent Commission elected by Parliament.¹¹ Other people have suggested that judges should be appointed by the Judicial Service Commission together with the Law Society.¹² It was also suggested that the Chief Justice and all High Court Judges should be appointed by the Judicial Service Commission.¹³ It has even been suggested that Judges should not be appointed by the President.¹⁴ There is a general feeling, rightly

10 UCC/1991/M2678 - p.13.

11 See UCC/Kab/RC2M/001, UCC/Bus/RC2M/090, UCC/1991/M2678, UCC/SRT/RC2M/50.

12 UCC/SRT/RC2M/50.

13 IGA/017 Baitambogwe.

14 UCC/SRT/RC2M/4.

or wrongly, that there cannot be an independent judiciary where the Chief Justice and the judges are appointed by the President. People who support the President to appoint judges want him to act on the advice of either the Judicial Service Commission or Parliament or both or even other members of the Supreme Court.

The suggested methods for appointing judges can be summarised as follows:

1. They should be appointed by the President on the advice of the Judicial Service Commission.
2. By the Judicial Service Commission.
3. By the Judicial Service Commission and approved by Parliament.
4. Elected by Parliament.
5. By the President on the recommendation of the Judicial Service Commission and approved by Parliament.
6. Judiciary should be democratised by having judges and magistrates elected.

In the case of the Chief Justice it has been suggested that he:-

- (a) should be appointed by the President on the advice of members of the Supreme Court;
- (b) should be nominated by the Judicial Service Commission and approve by Parliament;
- (c) should be appointed by the President with the consent of Parliament;
- (d) should be elected from among the Judges by an electoral college of Judges and members of the Law Society.

These suggestions express the concern that judges have been appointed on political grounds which has undermined their independence and impartiality.¹⁵ Because of this there is a feeling that the judiciary should have little to do with protection of human rights, which should be left to the Human Rights Commission or a Constitutional court.

It is not clear from the Odoki Report what consideration was given to the various proposals. The election of judges by Parliament was not accepted on the grounds that it would, introduce political bias

15 See UCC/1991/M2678, UCC/PLS/RC 3M/013.

without going into the merits and demerits of the other suggestions. The Commission agreed with the proposals that the President should appoint judges on the **advice** (not) **recommendation** of the Judicial Service Commission.

Thus it is provided that the Chief Justice and the Deputy Chief Justice shall be appointed by the President with the approval of the National Council of State.¹⁶ A Justice of the Supreme Court is to be appointed by the President **on the advice of the** Judicial Service Commission and with approval of the National Council of State.¹⁷ A similar procedure is prescribed for the appointment of the Principal Judge and Judges of the High Court. The DC stipulates that the Principal Judge and Judges of the High Court shall be appointed by the President **acting on the advice** of the Judicial Service Commission and with the approval of the National Council of State.

This is clearly an improvement on the 1967 Constitution: where the Chief Justice¹⁸ and the Principal Judge¹⁹ are appointed by the President in his absolute discretion: Nevertheless the National Council of State does not seem to be an appropriate body to approve such appointments. Although when it meets to make approvals the President and the Cabinet members will not take part, still the all pervasive influence of the President, the usual chairman, shall be on the members' minds.²⁰ There is no reason why such function cannot be performed by the Parliamentary committee on Constitutional, Legal and Human Rights proposed in the Draft Constitution.²¹ It is also not clear why the Chief justice and his Deputy should not be appointed on the advice of the Judicial service commission. It is the Commission which could clearly vet the candidates to make sure that they have the requisite qualifications stipulated in article 164. It is highly desirable that the Chief Justice and his Deputy should be independent of the executive as they are likely to be involved in the impeachment of the President under article 110. If the method of

16 Article 164 (1).

17 Article 164 (2).

18 Constitution of Uganda, 1967 art. 89A(1).

19 Constitution of Uganda, 1967 art. 84(1).

20 Draft Constitution art.153(2).

21 Draft Constitution Art. 143 (2)(e).

appointing Judges and Justices as outlined in the DC is retained then the Chief Justice and his Deputy should also be appointed on the advice of the Judicial Service Commission. Because appointing on the advice of the commission would mean that it is the Commission which initiates the appointments. It may even be made clear that the Justices and Judges shall be appointed on the **recommendation** of the commission and with the **consent** (not **approval**) of the appropriate committee of Parliament. It may be useful to revisit the other suggested methods of appointing judges with a view to reducing presidential powers in relation to appointments.

REMOVAL

There seems to be little alternative to the DC provisions on removing the judges from office.²² The judges are to be removed in rare cases by the President acting on the advice of the Judicial Service Commission and after due investigations by an independent judicial tribunal. The process of removing a judge can also be initiated by the ordinary citizens under a procedure provided in article 165(6).

It is suggested that the procedure under this section could be used to remove judges who fail to uphold fundamental human rights as directed by article 50(1) of the Draft Constitution. It has been recommended that all the judges should be resworn under a new form of judicial oath which would require them to uphold fundamental rights against inconsistent legislation as provided in article 2(2). Any judge who fails to do this and does not resign honourably should be removed by a petition to Parliament. However it seems desirable that the removal of judges should also be subject to approval of Parliament. It also does not seem to make sense by providing for different retirement ages for Justices and Judges as contained in articles 165(1) and 172(1). The retirement ages should be uniform.

22 (a) See Articles 165 and 172. UCC/KAB/RC2M/016.

(b) Wade Constitutional Fundamentals p.37 UCC/1991/M2518.

FACTORS AFFECTING THE INDEPENDENCE OF THE JUDICIARY

As noted above the judiciary is not viewed as the guardian of people's rights and the Constitution.²³ One reason for this is lack of moral courage on the part of the judges. The judges fear to make decisions against the executive. In Nigeria, for example, President Shonakan had to resign after the courts ruled that his appointment was invalid because the law which brought him to power was assented to by Babangida after he had officially stepped down as President and therefore had no Constitutional powers to assent to any law. In another Nigerian case²⁴ the courts invalidated the sedition section of the Penal Code as violating the Constitutionally protected freedom of expression. This decision was reached on the grounds that the impugned section did not provide for the defence of truth.

On the question of moral courage one English judge is quoted, extra-judicially, as saying:

The line has moved in the past ten years. The courts are less reluctant to interfere with what would once have been regarded as the Minister's prerogative. Partly it is a matter of confidence; as a judge you do it once and you don't get fired, so you do it again. You sit there and your first thought is, "Is this chap being fairly treated?" and if not, your next thought is, "Am I in a position to do anything to put it right? The new judges are more ready to give themselves the benefit of doubt."²⁵

The reason for this change in attitude is explained by another judge:

The courts have reacted to the increase in the powers claimed by the government by being more active themselves.²⁶

And in the case of Britain this new 'Judicial activism' on the lines of the American Supreme Court is largely attributed to Mrs. Thatcher because, "she was a confrontationist politician, and she was always pushing the limits of her authority".²⁷

23 UCC/KBR/RC3M/012, UCC/MOY/RCIM/012.

24 *Chief A. Nwanko v the State* (1985) NCLR 228 (FCA/E/111/83).

25 Lord Justice Hoffinan quoted by Justice M. Kilby "Courts and Policy: The Exciting Australian Scene" (1993) Vol. 19 No. 4 CLB 1794 at 1794.

26 Sir Thomas Bingham quoted by Justice M. Kilby *Ibid*.

27 Per Lord Woolf - *Ibid*.

And in Australia the High Court has adopted this judicial activism in a number of cases only two of which will be mentioned here. In *Mabos v Queensland*²⁸ the court held that the Australian common law recognised a form of native title. Where it had not been lawfully extinguished, it entitled the indigenous inhabitants of Australia, and their descendants, in accordance with their laws and customs, to their traditional lands. This decision ended the long held myth that at the time of European settlement Australia was *terra nullius*.

In another instance, the common law, at least since 1936,²⁹ has held to the view that by reason of marriage, there was an irrevocable consent to sexual intercourse on the part of the spouse. But the Australian High Court in *The Queen v L*³⁰ refused to uphold that notion which it regarded as no more than a legal fiction.

Lest one is accused of dogmatically borrowing foreign and more advanced ideas from the industrialised countries, a telling example from Zimbabwe may not be out of place. In *Catholic Commission for Justice and Peace in Zimbabwe v the Attorney General*³¹ proceedings were brought in the Supreme Court to restrain the respondents from carrying out a death sentence on four prisoners who were convicted for murder and sentenced to death. The Commission's claim was that the executions had been rendered unconstitutional due to the fact of prolonged delay, viewed in conjunction with the harsh and degrading conditions under which prisoners were confined in the condemned section of Harare central prison.

The main issue for determination was whether the delay in carrying out the sentence of death constituted a contravention of section 15(1) of the Constitution of Zimbabwe; which is in the same words as article 12(1) of the current Uganda Constitution. The section provides that:

No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.

28 (1992) 175 CLR 1., 66 ALJR 408 (H.C).

29 Hales History of the pleas of the crown Vol. 1, P629.

30 (1991) 66 ALJR 36 (H.C).

31 Judgement No. SC 73/93 civil No. 13/93 reported in (1993) Vol. 19. No. 4CLB 1393.

The court held that prisoners retained all basic rights, save those inevitably removed from them by law, expressly or by implication. Therefore, a prisoner who had been sentenced to death did not forfeit the protection afforded by section 15(1) of the Constitution in respect of his treatment while under confinement.³² That section 15(1) guaranteed that punishment or treatment of the individual be exercised within the ambit of the civilised standards which must not only take account of the emerging consensus of values in the civilised international community of which Zimbabwe was a part, but of contemporary norms operative in Zimbabwe and the sensitivities of its people.³³ The court went on to say that there was judicial and academic acceptance of the **“death row phenomenon”**: the confinement under a sentence of death as an exquisite psychological torture, and the attitude of courts that prolonged delays and the harsh conditions of incarceration were a ground for Constitutional attack upon the death penalty as amounting to a violation of the prohibition against “torture or cruel, inhuman or degrading treatment or punishment.”³⁴

Therefore, the inordinate delays were sufficient to invoke the protection against inhuman treatment afforded by section 15(1) of the Constitution. The court felt that in the circumstances an effective remedy for breach of section 15(1) was to set aside the sentence of death and substitute it with a sentence of life imprisonment. The court did this even when the President had confirmed the decision not to commute their sentence. But in a primitive outburst reported in the Ugandan press, one Mulosi, attacked government for delaying to execute certain prisoners on death row, whom he argued were overcrowding the prison and were a burden in terms of food and medical care. This draconian approach attributed to the Managing Director of the Catholic Centenary Bank, is incompatible with the human rights concern.

32 Following *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs and another* [1991] 1 ZLR 195 (S.C.).

33 See also *S v Ncube and others* [1987] 2 ZLR 246 (S.C.).

34 Quoting with approval *Soering v Union of India* [1989] 11 EHRR 439, *Madhu Mehta v Union of India* (1989) 3SCR 775, *People v Anderson* 493 P 2d 1274 (1972) *District Attorney for Suffolk District v Watson* Mass 411 NE 2d (1980) and Minority opinion in *Riley and others v Attorney General of Jamaica and another* [1982] 3 All E.R. 469 (P.C.).

What the above decisions illustrate can be better stated by paraphrasing Justice M. Kilby's comment on *Mabos* case. Decisions like these have brought home to the politicians and to the public what lawyers always knew; the vitally important role of the courts in the system of government and the particularly crucial role of the courts as the guardians of the Constitution and the law.³⁵ The Constitutional balance is slowly tilting towards the judiciary almost every where except in Uganda.³⁶

In Uganda the courts have not taken such bold stands. They have sometimes bent the law to please the executive. Part of the reason for this is lack of financial security on retirement and removal from office. By giving favourable decisions the judge may hope to be appointed to a board or commission in order to have a means of livelihood. Another related reason is corruption.

It has been suggested that to eliminate corruption and inefficiency in the administration of justice at all levels, there should be improved conditions of service, security of tenure and judicial ethics should strictly be adopted and followed and a jury system put in place.³⁷ The trial by jury and assessors is enshrined in the DC³⁸ and the qualification for judges are stipulated.

But the question of adequate remuneration and facilities is not dealt with by the DC. There are only general provisions. Thus under article 174(b), the Judicial Service Commission is mandated to review and make recommendations on the terms and conditions of service of judges and other judicial officers. It is also provided that the judiciary shall be self accounting, that the benefits of judges shall not be varied to their disadvantage and are charged on the consolidated fund.³⁹ Yet the question of funding is crucial to the independence of the judiciary. As the Law Society observed:

35 Mulosi was addressing the Round Table. See New Vision 2 July 1994. Justice M. Kilby op.cit p. 1795.

36 However the efforts of Justice F.M.S. Egonda-Ntende to put human rights norms uppermost in judicial decisions should be noted, See *Dr. J.W. Rwanyarare and others v Attorney General* No.(2) Misc. App. No. 85 of 1993, and ruling No.3 Misc. App. No. 85 of 1993.

37 Article 157(1).

38 Article 158.

39 UCC/1991/M2678 at p.13.

The Constitution must provide adequate funding of the judiciary so that it does not have to beg from the Ministry of Finance. Such a practice would undermine the independence and impartiality of the judiciary. By withholding funds the executive prevents the judiciary from doing certain things.⁴⁰

There should be a way of guaranteeing the judiciary adequate funds. And the judges should retire on full salary or at least three quarters of the salary of a sitting judge. The fact that the state will be incurring heavy expenditure on retired judges may act as a deterrent against removing judges from office without any serious reason.

ATTORNEY GENERAL AND MINISTER OF JUSTICE

It has been suggested that to enhance the Independence of the Judiciary the Office of Attorney General should be separated from that of Minister of Justice.⁴¹ The Attorney General should be the principal legal advisor to the Government. The Minister of Justice should deal with policy by controlling application of laws.⁴²

The DC leaves it up to the President to decide whether or not the Attorney General shall also be a Minister. Thus it provides that he may or may not be a Minister⁴³ though he is entitled to attend cabinet meetings.⁴⁴ It seems desirable that the offices should be separated, not only because of the functions the Attorney General is supposed to perform, but also because there is a need to depoliticise the administration of justice, which will enhance independence of the judiciary by removing likely political biases.

THE DIRECTOR OF PUBLIC PROSECUTIONS (DPP)

The importance of the office of the DPP in the administration of justice has not been fully appreciated. He has powers to institute⁴⁵ proceedings against any person in any court other than the Court

40 UCC/APC/RC 3 M/014.

41 UCC/1991/M2962.

42 Article 123(1).

43 Article 123(5).

44 See article 124.

45 Article 58.

Martial. Even if the proceedings are started by an individual he can take over such proceedings. He also has power to discontinue any proceedings.

The functions and powers of the DPP can affect the role of the judiciary as guardians of the Constitution especially in the protection of fundamental rights and freedoms, and in particular the right to a fair and speedy trial.⁴⁶ Though the DPP is the only officer Constitutionally mandated to prosecute, he does not have any control over the investigations leading up to prosecution. This function is assigned to the Police,⁴⁷ which is under the Inspector General of Police. And in the performance of his duties and functions the Inspector General of Police is not subject to the direction or control of any person or authority.⁴⁸ Only the President may give him direction on matters of general policy. Whether or not matters of general policy include investigation of specific crimes is a moot point.

There have been cases of arbitrary arrests and arrests without sound preliminary investigations⁴⁹ yet the DPP can only advise but not order the police to do further investigations. One wonders how the DPP in performing his functions, can have regard to the interests of administration of justice⁵⁰ without any control on investigations. The DPP is also not subject to the control or direction of any person or authority though the Attorney General may give him/her directions on matters of general policy.⁵¹

These provisions cannot help the judiciary in the administration of justice and in respecting, upholding, promoting and protecting the liberty of the individual.⁵² There is need to find a workable formula whereby the DPP can work together with the investigative arm of the Police.

46 Article 241 (b).

47 Article 242 (4).

48 Article 124 (5).

49 Article 125(5).

50 Article 124(6).

51 Articles 50(1) and 255.

52 *Ibid.*

JUDICIAL SERVICE COMMISSION

Under the 1967 Constitution the Commission was largely composed of the President's men.⁵³ The DC has tried to remedy this situation. It is proposed that the Commission should be composed of the Chief Justice, who is appointed by the President with the approval of the National Council of State.⁵⁴ The Principal Judge who is appointed by the President on the advice of the Judicial Service Commission with the approval of the National Council of State⁵⁵ and the Attorney General, appointed by the President **with the prior approval** of the National Council of State,⁵⁶ are also members.

There are other members not being less than six appointed by the President with the approval of the National Council of State. Three members must be appointed from persons who have been elected by the Law Society.⁵⁷ These must be people who would be qualified to be appointed Judges of the High Court.⁵⁸ Two members appointed from the Public Service Commission and one prominent citizen.

There is no requirement for approving members of the Commission partly because most of them would have been approved for the positions they hold except those elected by the Law Society, who must be qualified to be judges and the prominent citizens.

It may be necessary to find ways of making sure that the majority of the members of the Commission are not necessarily Presidential appointees. This is because there is a general feeling that the executive should be given sufficient powers to govern but should not be constituted into an imperial executive.

53 1967 Constitution, article 90.

54 Article 164.

55 Article 170(1).

56 Article 123 (1).

57 Article 173(2)(a).

58 As stipulated in article 170 (2) with article 173(2)(b).

CHAPTER IX

SELECTED CONSTITUTIONAL CASES AND MATERIALS

RWANYARARE & ORS v ATTORNEY GENERAL OF UGANDA
MISC. APPLICATION NO. 85 OF 1993

**MR. JUSTICE F.M.S. EGONDA-NTENDE DELIVERED THE
RULING OF THE COURT AND REFERRED ONE QUESTION
TO THE CONSTITUTIONAL COURT ON DECEMBER 14,
1993.**

In considering this application regard must be had to rule 3(2) of the Fundamental Rights and Freedoms (Enforcement Procedure) Rules, 1992 and article 87 of the Constitution. I will set out both of them in full. Rule 3(2) states:

Where, in relation to an application, any question as to the interpretation of the Constitution arises, the Judge hearing the application shall apply the provisions of article 87 of the Constitution and decide whether or not to refer the question to the High Court constituted in accordance with article 87 of the Constitution Procedure Rules, 1992 shall apply to a reference made under this sub-rule.

Article 87 of the Constitution states:

(1) Where any question as to the interpretation of this Constitution arises in any proceedings in any Court of Law, other than a Court Martial, and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the High Court consisting of a bench of not less than three Judges of the High Court;

Provided that no such question need be so referred if the Court is of the opinion that it is not sufficiently important to the proceedings to require a reference to the High Court.

The question now before this Court is whether a question as to the interpretation of the Constitution involving not only a substantial question of law but one of such sufficient importance to these

proceedings has arisen. If it has arisen, then this court is obliged to make reference of such a question to the Constitutional Court and thereafter to dispose of this case in accordance with the decision of the Constitutional Court.

I am not aware of a decision of this Court or the Supreme Court that dealt with the issue of reference to a Constitutional Court after the promulgation of the Fundamental Freedoms and Rights (Enforcement Provisions) Rules of 1992. These rules though, appear to reflect the position as it obtained prior to their promulgation, as enunciated in the case of *Attorney General v Milton Obote Foundation and another* C.A. No. 7 of 1992 (unreported). The learned Chief Justice stated:

... but I held the view and I still do that where a question as to interpretation of the Constitution arises in any proceedings, the trial court should not only frame the issues which have arisen for interpretation but must also record evidence which is necessary to resolve those issues. This is how the learned Chief Justice, Sir Udo Udoma had addressed his mind to a similar situation and I was in effect agreeing with him in the passage I quoted from the Lutakome case, in support of my preference of the law as it was previous to the Lutakome case which is the law now applicable. The Court where issues of interpretation arise is the trial court. The Constitutional Court is only of a court of interpretation and is required after reaching a decision on interpretation, to refer the matter back to the trial court for that court to continue with the trial and reach a decision in the case before it in accordance with interpretation given by the Constitutional Court.

Later on, the learned Chief Justice made the following directions in respect of that case. He stated:

... I would direct that the original suit between the parties be set down for hearing and if at the hearing the parties wish to take any preliminary points for a decision, then the trial court shall frame the issues to be determined and shall also record the evidence necessary to substantiate any claims made. If the trial court is satisfied that the questions raised involve a substantial question of law or if the court is so requested by any of the parties it shall then make a reference of the issues to a Constitutional Court provided that it is of the opinion that the issues are sufficiently important to the proceedings to require such reference.

I suppose I must presume in this case that the evidence “necessary to substantiate” the contending claims of either party hereto is already on record. This is so because evidence was adduced by way of affidavits. And no party has applied to adduce any further evidence. The applicants filed 4 affidavits in support and the respondent filed one affidavit in reply. In our adversarial system it is the duty of the parties to an action to adduce all necessary evidence as the law may permit and it is the duty of the court to adjudicate on the issues in controversy relying on the evidence adduced and the law applicable.

What amounts to a substantial and important question of law in the interpretation of a Constitution received scant treatment in the address to this Court by learned counsel for the respondent. Since a Court must satisfy itself that not only does a substantial question of law exist, but that it is sufficiently important to these proceedings, it may be useful to look at past decisions of this Court and other decisions of persuasive value from other jurisdictions as a guide to what may amount to a substantial and important question of law meriting consideration of a Constitutional Court.

In *Masaba v Republic* (1967) E.A. 488 at page 491, the learned Chief Justice, Sir Udo Udoma, stated:

... as I understand it, the provision of Article 95(1) does not necessarily preclude a single Judge from dealing with questions involving the interpretation of the Constitution, although for the sake and in the interests of uniformity in the construction of the Constitution, it is desirable that such questions, because of the importance attached to them, should be referred to and dealt with by the Constitutional Court...

In *Shah v Attorney General* (1970) E.A. 523, Goudie J., considered an application seeking to declare, section 2 of the Local Administrations (Amendment No. 2) Act, 1969 void for being in contravention of Articles 8(2)(c) and 8(5) and 6 of the Constitution. The section nullified any judgement in respect of certain proceedings. The Judge referred this matter to a Constitutional Court for decision.

In the case of *Valerian Assa Ovonji v Attorney General* Constitutional Case No. 26 of 1981, the plaintiff had been serving as Deputy Chairman, Public Service Commission. He was dismissed by the Chairman, Military Commission, on the ground that he

had accepted an elective office in a political party. He argued, *Inter alia*, that the dismissal was in contravention of article 101(6) of the Constitution and contrary to his fundamental rights and freedoms under article 8(2)(b). He successfully applied that these questions be referred to a Constitutional Court which sat and delivered its decision. I may also refer to the case of *Thornhill v Alabama* 310 U.S. 88 (1940), a decision of the Supreme Court of the United States of America, which was cited by counsel for the applicants in their main submissions. The facts are that section 3448 of the Alabama State Code made picketing a misdemeanour. However, Byron Thornhill joined a picket line that was picketing his former employer. He was arrested, tried and convicted of violating the Alabama Law. He was fined US\$100 plus Court costs but refused to pay and was sent to jail in default. He appealed to the US Supreme Court challenging the Constitutionality of the Statute. The Supreme Court, in an opinion delivered by Justice Murphy, stated:

We think that Section 3448 is invalid on its face. The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment ... Freedom of discussion if it would fulfil its historic function in this nation must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period ... But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may be persuaded to take action inconsistent with its interests. Abridgement of this liberty of such discussion can only be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.

It would appear that previous decisions of this court have treated every question touching on the fundamental rights and freedoms enshrined and protected in articles 8 to 20 of the Constitution of Uganda as substantial and important questions of law especially where such rights and freedoms are alleged to be endangered by ordinary legislation.

In the instant case the applicants attack rules 11(1), 11(2), 12(1), 12(10), 13, 29 and 36 of the Constituent Assembly Election Rules for contravening their fundamental rights and freedoms protected under articles 8(2)(b), 17(1), 18(1) and 20(1) of the Constitution.

The applicants are members of a political association known as the Uganda People's Congress and wish to participate in the forthcoming Constituent Assembly elections on a distinct UPC ticket. It is claimed that the Constitution assures them of this right in so far as it protects the applicants from discrimination wholly or attributable to *Inter alia*, political opinions, under article 20(1). It is argued that in addition under articles 17(1) and 18(1) the applicants' rights to freedom of expression and freedom of assembly and association are protected and no law can be made that is inconsistent with the guaranteed rights and freedoms. It is argued that the Attorney General has not shown by way of evidence or otherwise that the rules complained of fall within the clawback clauses contained in articles 17(2) and 18(2).

It has been argued by counsel for the applicants that the practical effect of these rules include the following:

- (i) to disqualify the applicants from participating in the Constituent Assembly elections on the basis of their political association;
- (ii) to gag the mouths of the applicants from articulating to the public their political opinions and the opinions of their political party as guaranteed by article 17(1) of the Constitution;
- (iii) to stop the applicants from calling lawful meetings to freely present their political opinions as guaranteed by the article 18(1) of the Constitution;
- (iv) to coerce the applicants to attend candidates meetings against their will in contravention of article 18(1);
- (v) that the section of the people who believe in "non" partisan and "personal merit" type of political opinion are treated favourably and are not hindered by the rules to air their views to the public;
- (vi) that the public will be denied the opportunity to hear views except those considered right by Government.

The applicants have argued that rules 11(1), 11(2), 12(1), 12(10), 13, 29, and 36 of the Constituent Assembly elections are merely the enactment into law of views that have for long, prior to the enactment of these rules, been held by NRM leaders. Reports of such views in newspapers were cited and a press release by the National Political Commissar dated 18 June 1992 was annexed to the applicants' affidavits. The press release states in part:

NRM does not have any intention of imposing its views and dictating to the people of Uganda what political system they should have for their future governance. That is why it set a Constitution making process in motion for the people to freely decide systems for their governance. Whatever the people of Uganda choose shall be respected by NRM. However, NRM reserves the right of making its position clear and known to the people.

In this period before the people decide on the type of Constitution they would like to have, NRM interim arrangement will stand. Political party activities will remain suspended. NRM is fully committed to this position and its capacity, will and determination to enforce it should not be doubted...

SIGNED ERIYA KATEGAYA
 1ST DEPUTY PRIME MINISTER AND
 NATIONAL POLITICAL COMMISSAR.
 18TH DAY OF JUNE 1992

The applicants have in their affidavits stated that this position of Government has been manifested by the Uganda Police Force. Using force, it has dispersed several lawful and peaceful meetings on the 30 April 1993 at Austine Hall and Elgon Hotel at Mbale; on 24 April 1993 at Mt. Elgon Hotel; on 27 April 1993 in the garden of Mt. Elgon House at Mbale and on the 28 February, 1993 in Arua Town Social Centre, Arua.

As a result of the foregoing, the applicants claim to be in a state of fear that their rights enshrined in article 8(2)(b), 17(1), 18(1) and 20(1) of the Constitution are likely to be contravened with the implementation of rules 11(1), 11(2), 12(1), 12(10), 13, 29 and 36 and hence seek the protection of this Court.

Rules 13 and 29 prohibit the addressing of public meetings or public rallies for the purpose of soliciting votes by candidates or any

other person save at a candidate's meeting organised by the presiding officer at which under rules 11(2) a person must not as it were disclose that he belongs to any political party. The latter earns an offending candidate disqualification from the Constituent Assembly elections and the former the wrath of penal sanctions.

The campaign practices which have been hitherto common and legitimate not only in this country but the world over are proscribed by these rules and in place a new phenomenon known as "CONSULTING" has emerged with official sanction. It is captured by a letter from the Commissioner, Constituent Assembly Elections Commission, dated 12 November, 1993 and addressed to the Returning Officer, Rukungiri District. It is annexed to the supplementary affidavit sworn by the 1st applicant. It states:

12 November, 1993
The Returning Officer
Rukungiri District
RUKUNGIRI

Dr. Rwanyarare has reported to me that he is being stopped from consulting voters.

I should like to draw your attention to rule 13 as contained in the third schedule of the Constituent Assembly Statute, which states as follows:

Subject to sub-rule (2) of rule 11 any candidate may in addition to attending candidates meetings use other methods of campaigning such as distribution of posters and pamphlets to solicit votes from voters but no candidate shall hold any public meeting intended to solicit votes other than at a candidate's meeting.

He should therefore be allowed to consult voters as long as he does not contravene provisions of the Statute.

(signed) *(Stephen B. Akabway)*
Commissioner for the Constituent Assembly

c.c

c.c

c.c *Dr. Rwanyarare.*

I must confess some difficulty on this subject but how a candidate can consult voters silently or otherwise without addressing them in

order not to commit the offence created by rule 29 is somewhat perplexing to me. A reading of rule 13 and the Commissioner's letter referred to above would suggest that except for the candidate's meeting, candidates can only campaign by way of the "Consulting approach", by posters and pamphlets and the voters must perhaps respond similarly in writing or on the voting day! Is this consistent with articles 17(1) 18(1), & 20(1) of the Constitution?

The purpose of a bill of rights is to secure certain rights and freedoms, regarded as fundamental to a nation's people, which cannot be freely transgressed by those in authority. It is also intended to ensure that all the people receive the protection of the law as well as to participate in matters of individual or national interest on a "playing field" that is equally levelled for all. As was aptly observed by the Supreme Court of the Philippines in the case of *Philippine Blooming Mills Employees Organisation v Philippine Blooming Mills Co. Inc.* 51 SCRA 200 (quoted in Human Rights, Justice and Peace; Manual of References):

... The Bill of Rights is designed to preserve the ideals of liberty, equality and security against the assaults of opportunism, of small encroachments, and the scorn and derision of those who have no patience with general principles...the purpose of the Bill of Rights is to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the Courts.

Counsel for the respondents submitted that the rules complained of did not violate the Constitution and were intended for the orderly management of elections. These rules, he claimed, applied to all persons equally and were therefore not discriminatory. This line of reasoning brought to my mind a statement by Justice William Douglas quoted in *Magan v Enrile* 139 SCRA 389 (quoted in Human Rights, Justice & Peace; Manual of Reference) which reads:

The challenge to our liberties comes frequently not from those who consciously seek to destroy our system of government, but from men of goodwill, good men who allow their proper concerns to blind them to the fact that what they propose to accomplish involves an impairment of liberty ... The motives of these men are often commendable, what we must remember, however, is that preservation of liberties does

not depend on motives. A suppression of liberty has the same effect whether the oppressor be a reformer or an outlaw. The only protection against misguided zeal is constant alertness of the infraction of the guarantees of liberty contained in our Constitution. Each surrender of liberty to the demands of the moment makes easier another, larger surrender. The battle over the bill of rights is a never ending one ... The liberties of any person are the liberties of all of us ... In short, the liberties of none are safe unless the liberties of all are protected.

It would appear that no infraction that may affect our Chapter 3 rights, (article 8 to 20) of the Constitution, may be treated as an unimportant and perhaps a less substantial matter. Such a matter may have important consequences for our human rights jurisprudence and there is every reason to have the matter dealt with authoritatively at every appropriate moment. I have unhesitatingly come to the conclusion that this application has raised substantial and important questions of law with regard to the enforcement of fundamental rights and freedoms assured to the people of this country in articles 8(2)(b), 17(1), 18(1) and 20(1) of the Constitution. It is important to the people of Uganda or even only to a small section thereof to know whether rules 11, 12, 13, 29, and 36 of the Election Rules are consistent or inconsistent with the Constitution.

For the reasons I have discussed above, I therefore refer this questions to the Constitutional Court:

Are Rules 11(1), 11(2), 12(1), 12(10), 13, 29 and 36 of the Constituent Assembly Election Rules made under Statute No. 6 of 1993, The Constituent Assembly Statute consistent with Articles 8, 17, 18 and 20 of the Constitution of Uganda?

The Constitutional Court was subsequently set up consisting of Mr. Justice Wilson Kityo, Mr. Justice Tabaro and Justice Mpagi Bahigeine. The Kityo Court heard and disposed of the question referred to it in a unanimous opinion contained in three separate judgements.

Mr. Justice Wilson Kityo delivered his opinion:

On the other hand, as regards the Supreme power to legislate, it is admitted by the respondent/applicants that the Proclamation in the Legal Notice 1/86 as amended in 1987 is a valid old piece of

law, giving all the Supreme Legislative Powers, to the NRC as the Supreme Legislating Body in the country.

It is equally important to add that by that same law, the exclusive power formerly enjoyed by the Parliament to make laws as in article 3 of the Constitution, or to amend the Constitution, was by the proclamation law suspended or extinguished.

Therefore, the logical conclusion is that the relationship between those parts of the Constitution which were saved, together with the other existing laws, both viewed from one side, as related to the Proclamation on the other; the first group is in an inferior position, as they have to be construed with such modification, adaptation and qualification, so as to bring them into conformity with the Proclamation.

Rule 11(1) has been specifically attacked, on the ground that it prohibits or excludes the partisan aspirants, from participating in the election and permits only the aspirants, who base their candidacy upon their own personal merits; thereby classifying the possible aspirants into two categories. It is therefore, necessary to examine the terms or terminology used in labelling the classification of the two suggested categories. The terminology (partisan) is defined to describe a strong supporter of a party, group, plan etc., etc., especially the unreasoning one. See the *Longman Dictionary of Contemporary English*. There is yet, another definition of the same terminology, as an adherent of a party, cause etc., etc., especially an unreasoning one. See the **Concise Oxford Dictionary**. These two examples of the definitions of the term 'partisan', describe the category as being rather uncompromising or so fixed so as not to be able to see any other possible views outside the one held.

However, the scrutiny of the two suggested categorisations, reveals that they are not exclusive, of each other. I believe that every reasonable member of a community, must have some merits or good qualities, which are personal to him or otherwise the good qualities which other members, in the same community, accord or attribute to him. Therefore, the test of personal merits, in my view, is bound to involve, the greatest number of reasonable members of the community, participating in the exercise and will also include, those members with partisan interest or group allegiances to some other

groupings. Therefore, the grouping of partisans v non-partisans or personal merits group, are two categories which are not exclusive of each other; because personal merits group includes partisan group as well. Therefore, all the reasonable aspirants are subjected to the same test, in the rules now in issue and therefore, the rules cannot be regarded as being discriminatory, but applies to all and for the good of all, equally.

It was urged that the new Supreme Law of this country, is the Proclamation, plus the saved parts of the Constitution, and the provision in section 13(1) of the Proclamation was a mere rule of construction, which did not confer a special or overriding status to the Proclamation.

However, the terms employed in the section, such as qualifications, adaptations and modifications, were clearly stated to be mandatory, for construing the surviving parts of the Constitution; they therefore, clearly import that the Constitution is in a position not equal to that enjoyed by the Proclamation, but placed in a second position as a source of the Supreme Law of the Land.

The provisions in section 2(1) of the Proclamation, provides for the intention, for a future enlargement of the composition of the NRC, so as to include political forces, or groups, and therefore, the Proclamation is clearly shown to be committed to the rule of pluralism by facilitating for those other groups. Counsel has further cited authoritative writings, about the common law presumptions from the Book of Keir and Lawson, but which same presumptions are only suitable for interpreting the British Constitution but as regards those presumptions in the Uganda Constitution, they are expressly stated in Chapter III of the Constitution of Uganda. In fact all the created rights and freedoms, cannot be taken away, except by law, which fact is clearly stated in the same part of the Constitution. However, the law envisaged in Chapter III, is not defined, but it must be obvious, that it is a law enacted by the Supreme Legislative Body, which is empowered to legislate for this country, i.e. the NRC.

But the legislation at issue in the present case, is a statute, made in pursuance of and under the authorisation in the Proclamation in the Legal Notice No. 1/86, as earlier cited and the rules themselves

were made in the same Statute by the same enacting body (NRC), but not by the delegated legislation assigned to another body.

Mrs. Justice E.A. Mpagi Bahigeine concurred and delivered her opinion:

It was not disputed that by the Proclamation Legal Notice No. 1 of 1986 (amendment) Decree No. 1 1987, article 3 of the 1967 Constitution by which Parliament could alter the Constitution and article 63 according legislative powers to Parliament were suspended and in lieu thereof section 7 of the Legal Notice provided:

- (i) All legislative powers hitherto exercised by Parliament are hereby vested in the NRC and shall be exercised through the passing of statutes assented to by the President.
- (ii) The NRC may regulate its own procedure. Most importantly section 13 added:
 - (I) Those provisions of the Constitution including article 64 (legislative powers of the President) thereof which are inconsistent with this Proclamation shall to the extent of such inconsistency be void.
- (iii) Subject to this Proclamation the operations of the Constitution and the existing laws shall not be affected by this Proclamation, but shall be construed with such **modifications, qualifications, and adaptations** as are necessary to bring them in conformity with this Proclamation.

Pausing here for a moment, what is the import of these three words in this context, “modifications”, “qualifications” and “adaptations”?

According to *Longman Dictionary of Contemporary English*:

“Modification” means making less hard to accept or bear while “qualification” is limitation of something stated, and “adaptation” connotes changes to something so as to make it suitable for new needs or different conditions. It appears to me these are wide dominating words in this context obviously intended to cover the manner of construing what is left of the Constitution and the existing laws to bring them in conformity with the Proclamation, for the subsection states “subject to this Proclamation...”. I therefore consider that in giving effect to those words the Proclamation assumes the superior

obligation and validity over all existing laws and the Constitution. It is **not fused** with it. (See the Judgement of Kityo J. in the case of *E.F. Ssempebwa v Attorney General* [Constitution Case No. 1 of 1986]).

According to these limitation clauses it is clear these rights are not absolute but relative and must be exercised in subordination to public good and order. It has been accepted that however precious personal liberties may be, there is something for which they may well be to some extent sacrificed by legal enactment in certain circumstances. In this regard, in my view comparing the Rules passed by NRC in its legislative capacity with the Articles invoked this is the situation envisaged. It was no way contended that these liberties can be invaded arbitrarily at the mere whip of NRC. What was said was that NRC has been empowered by Legal Notice No. 1/86 (amendment), Decree No. 1/87 for paramount objects of state to invade by legislative enactment for public and good order to prevent breakdown of law and order or a state of anarchy.

Finally the life of the statute and the rules is temporary. It has been an unusual and peculiar political process which would end with promulgation of the new Constitution.

At the end of the period fresh consideration will arise and most likely during the debate of the Draft Constitution all thorny and burning issues will be resolved.

The effect of all this is that the Proclamation Legal Notice No. 1/86 (amendment), Decree No. 1/87 has superior validity as giving absolute powers to NRC to legislate and the laws so legislated and placed before us for interpretation are in conformity with the Constitution (see section 13). Whether the laws in question are bad laws their removal lies not with this court but with the processes of democratic Government.

F.E. Ssempebwa v Attorney General Constitutional Case no.1 of 1986

Mr. Justice Arthur Oder delivered the opinion of the court:

Applying the decisions in those cases to the present, I hold that the new legal order or grundnorms (hereinafter referred to as

“the new Constitution of Uganda prior to 23/8/1986 consisted of LN1/86 and the unsuspended provisions of the 1967 Constitution, which remain valid by reason of their having been “received” or “adopted” into the new legal order.” The new Constitution is, therefore, the basic or fundamental law of Uganda which directs the principles upon which the Government is founded, sets out the framework and major organs of the Government, defines the powers and functions of those organs, and the relationship between one another, and regulates the exercise of those functions and powers. It has special legal sanction embodying those principles.

Before LN1/86 suspended article 3 of the 1967 Constitution, the Constitution could be amended or altered only by legislation made in a particular manner as prescribed by that article, according to which amendment of certain articles required special majorities for example, Chapter 11 concerning citizenship and Chapter III concerning protection of fundamental rights, and freedoms of the individual. Other articles, however, required simple majority in the National Assembly. The effects of the articles meant, in my view, that the Constitution could be amended or altered only by legislative validly passed by Parliament, which consisted of the National Assembly and the President; article 39. Although article 3 has been suspended by LN1/86, I accept the contention that similarly the new Constitution can be amended or altered only by some form of legislation validly made. This view is fortified by the fact that in peace time, the 1967 Constitution has always been amended by legislation, for example, Decree No. 20 of 1977, which established the Court of Appeal of Uganda for the first time; Decree No. 12 of 1979; Statute No. 8/80 and 12/80. Is LN6/86, which purports to amend the new Constitution such a valid legislation? *The new legal order having set up a new Constitution with a legislative frame work a valid legislation, in my view, can only be one which is made in accordance with that legislative framework.* I accept the submission that after a successful revolution the new authority is free to set up conditions for the basis of the new legal order, and once it does so, it is bound by them, and cannot depart from them. The Kelsenian theory and *Matovu* and *Kirya* cases already discussed support that view. Consequently, I hold that as the new Constitution sets out the legislative powers, by

whom and how such powers are to be exercised, even the NRC as the sovereign power who made the Proclamation LN1/86 is bound to work within the new Constitution. It cannot thereafter validly legislate outside that framework.

There is no doubt that according to clause 1 of LN1/86 only Chapters IV save article 24,V and articles 3 and 63 of the Constitution are suspended. Chapter III which contains the Bill of Rights, as the learned counsel for the applicant put it, is not suspended. To my mind this means that Chapter III remains as part of what I have earlier referred to in this judgement as the new Constitution. This also means that article 8, which guarantees the fundamental rights and freedom of the individual and article 13, which guarantees protection against deprivation of property without compensation have been left intact.

According to the finding I have made in the second reference above, the applicant's judgement debt in HCCS 435/82 is protected by those Constitutional guarantees. The effect of paragraph 12(2) is to nullify those guarantees in so far as the applicant's judgement and others like him are concerned. The learned Attorney General argued that the effect of paragraph 12(2) is to indemnify the Government or Local Administration from liability in selected cases which arose within a limited period and in which the government or Local Administrations would ordinarily be vicariously liable for torts of assault, injury, deaths, false arrest and trespass to or conversion of property committed by a limited class of employees or servants. Accordingly, the indemnity is limited in time, by category of cases, in respect of remedy, and only to vicarious liability. It does not cancel the tort as such. It exempts the Government or the employer, not the tortfeasors. So the affected person can sue the tortfeasors. In view of those limitations, the learned Attorney General concluded, it is not correct to say that paragraph 12(2) takes away the fundamental rights of the individual. Although the applicant in the present case has lost a relief, that relief is not a breach of the Constitution but of common law rights to resort to an employer for a wrong done by an employee. With respect, I do not accept that argument, outside the scope of this reference. Moreover, they have not been proved before us.

Let us return to the conflict or the inconsistency between paragraph 12(2) and articles 8(2)(c) and 13. At the cost of repetition, I will again look at what it says:

13(1) Those provisions of the Constitution including Article 64 thereof, which are inconsistent with this Proclamation, shall, to the extent of such inconsistency, be void.

(ii) Subject to this Proclamation the operations of the Constitution and the existing laws shall not be affected by this Proclamation, but shall be construed with such modifications, qualifications and adoptions as are necessary to bring them in conformity with this Proclamation.

To my mind, paragraph 13(1) means that as paragraph 12(2) purports to amend LN1/86, articles 8(2)(c) and 13 of the Constitution for purposes of our case are void, because they are inconsistent with paragraph 12(2). They are inconsistent because they purport to guarantee property rights in the applicant's judgement debt which paragraph 12(2) nullifies. Put simply, this means that for purposes of the applicant's case articles 8(2)(c) and 13 are void. In effect it means that they should be regarded as repealed by implication, since there was no express repeal by paragraph one of LN1/86. If the two articles are repealed [as that is the interpretation I have given to paragraph 13(i)] then they no longer exist for purposes of our case for them to "be construed with such modifications, qualifications and adaptations as are necessary to bring them in conformity with this Proclamation". It would appear therefore, that paragraph 13 (ii) is not applicable directly to articles 8(2)(c) and 13 for the purposes of this case. It is applicable, however, indirectly in so far as the operation of the Constitution as a whole has to be modified, qualified or adapted so as to bring it in conformity with LN1/86.

As the legislature on the one hand did not expressly repeal articles 8(2)(c) and 13 by LN1/86, did it repeal them by implication under paragraph 13 so that paragraph 12(2) can be effective? For paragraph 12(2) can only be a valid amendment if articles 8(2)(c) and 13 are repealed by implication by paragraph 13(i). But can it be said that the two articles are repealed merely by implication so that the fundamental rights of the applicant are nullified? To find answers to such questions, in my view, requires finding out the intention of the legislature. I agree with counsels' submissions that

articles 8(2)(c) and 13 of the Constitution being sacred guarantees to the fundamental rights of the individual, it could not have been the intention of the NRC both at the time when LN1/86 and LN6/86 were made that paragraph 13 would be implied to take away property rights such as the applicant's. In my view, that intention should have been present on both the occasions when the two legislations were passed. Before LN1/86 brought in what I have called the new Constitution, Chapter III (inclusive of the two Articles in question) was regarded as sacred in that it could be altered under article 3(3) only by a two-thirds majority of all the elected Members of Parliament. This meant that they could not be altered easily. It is also probably due to the sacredness of Chapter III that since its enactment no Government has yet formally altered it by legislation. I do not think that the present legislature or Government regards Chapter III as any less sacred. That, in my view, is why LN1/86 left Chapter III intact. For the reasons advanced by counsel, with all of which I entirely agree, I am not convinced that the NRC and the present Government intended or could have intended to repeal, or did repeal, for purposes of paragraph 12(2), articles 8(2)(c) and 13 impliedly – articles which have always been regarded sacred. No doubt, the NRC and the Government have powers to repeal these articles of the Constitution, but I think that if they intended to do so, it would have been done so expressly in LN6/86. It could easily have been said in paragraph 12(2) something to the effect that “notwithstanding the provisions of Chapter III of the Constitution, any suit, action, proceedings against the Government or Local Administration arising out of the acts or omissions referred to in sub-paragraph (2)(i) of this paragraph pending in any court of law immediately before the 23.8.1986, shall forthwith lapse and any judgement which is not fully executed or fully satisfied before that date is hereby nullified.” That form of expression would allay the learned Attorney General's fears that suspending articles 8(2)(c) and 13 would have meant that even today there would be no protection for those rights protected by Chapter III.

In considering whether the NRC by paragraph 12(2) did or did not infringe on the fundamental rights of the applicant, it is also relevant to recall the cardinal principle of interpretation, to the effect

that statutes interfering with private rights and private interest ought to receive strict interpretation against the party interfering with or taking away the rights: Beal's Cardinal Rules (*Supra*). As paragraph 12(2) seeks to interfere with the private rights of the applicant in his judgement debt it has to be construed strictly against the respondent who is seeking to interfere with these rights.

Another relevant principle of interpretation, which in my view cannot be overemphasised in the present case concerns the retrospective operation of paragraph 12(2), the effect of which is that things done when they were correct and right which were expected and known to have occurred at the time are now extinguished. The learned Attorney General said that the applicant's complaint in this regard should be ignored, because the only law which prohibits retrospective legislation is article 15(4) of the Constitution, which is concerned only with criminal legislation. That may be so, but it is also obvious that our legal system often frowns upon retrospective laws. In the *Shah* case, Jones, J. put it in the following words – at page 531:

Had the Amendment Act not had a retrospective operation, it might perhaps be less obnoxious. No rule of construction is more firmly established than this, that a retrospective operation is not to be given to a Statute so as to impair an existing right or obligation, otherwise than as regard matters of procedure; unless that effect cannot be avoided without doing violence to the language of the enactment.

Paragraph 12(2) is clearly retrospective in effect, and the same principle applied in *Shah* applies here with equal force. There is another fundamental Constitutional consideration, why I think that the NRC could not have intended to repeal articles 8(2)(c) and 13 by implication and which requires emphasis here. In the system of Government which operates in Uganda, there are three arms of Government, namely, the Legislature, the Executive and the Judiciary. The primary function of the Judiciary is to determine disputes either between subjects and the State or between subjects. Judges must apply the law and are bound to follow the decision of the Legislature as expressed in Statutes or applied in decided cases. In countries where there are written Constitutions which cannot be overridden by the ordinary process of legislation, the Judiciary is

in a special sense the guardian of the Constitution and may declare a statute to be unconstitutional and invalid, a task this court is faced with in the instant case. To discharge its functions properly, it is necessary that the Judiciary should be independent. See *Wade and Phillips Constitutional Law* 5th Edition, page 249. That independence, and the proper operation of the rule of law, in my view, requires respect for judicial decisions. This means non-interferences by the legislature and the Executive with judicial decisions. The legislature of course, can, and does, intervene where necessary, in the public interest and reverse judicial decisions, but this is done extremely rarely. In Uganda it appears to have been done only once before – in *Shah's case (Supra)* without success. Otherwise if judicial decisions are interfered with as a matter of course, or worse, simply by implication, what faith would individuals have in the rule of law? And if rights creating judicial decisions can even be nullified by implication what faith would individuals have in the judicial process? I think that answers to these questions require that if the legislature has to nullify judicial decisions, which protect the fundamental rights of the individual such as in the present case, its intention should be clearly expressed.

I have referred above to public interest. In the instant case, the Attorney General said that the amendment in paragraph 12(2) was necessary to save public funds from the inordinate claims resulting from massive violation of human rights which characterised the maladministration by previous Governments. There was, therefore, a conflict of interest, of the individuals who were entitled to redress as a result of torts they had suffered on the one hand, and the need to save public funds on the other. While we were left wondering why the date 1.11.1978 was chosen, that, in short, is the justification for tampering with the fundamental property right of the applicant's and others like him in this case. The learned Attorney General, however, admits that as a result of paragraph 12(2), the applicant and others have lost relief, and that if there was a way Government could have expressed its sympathy to them, it would have done so. The idea of saving public funds is no doubt a noble one but the loss the applicant and others in the same boat now have to suffer, could have been avoided or minimised. Payments to him and those who

had already received their judgements could have been staggered, for instance, by issue of Treasury Bills. In this regard, it is to curious to observe that paragraph 12(2) did not extend to contracts which have not had the scrutiny of Courts. Instead the legislation appears to have penalised victims of torts who, have suffered bodily injuries or loss of property. In my view, if paragraph 12(2) was intended to protect the Treasury, it should have extended to contracts as well and not left confined to torts where the Courts have scrutinised the claims.

In the circumstances, and for the reasons I have given, my view is that the NRC did not intend to repeal, and did not repeal, by implication the provisions of articles 8(2)(c) and 13 of the Constitution. Consequently, I find that paragraph 12(2) is in conflict with the provisions of those two articles of the Constitution. In the result I declare that paragraph 12(2) of LN1/86 as amended by LN6/86 is inconsistent with the Constitution of Uganda, having regard to the provisions of articles 8(2)(c) and 13 of the Constitution.

Leonard Hector v Attorney General of Antigua and Barbuda (1990)
2 WLR 606 (PC)

The applicant, a newspaper editor, was charged with printing a false statement likely to undermine public confidence in the conduct of public affairs contrary to section 33B of the Public Order Act, 1972, which contained the following penal provisions inserted by a 1976 Amendment Act:

Any person who printed or distributed any false statement, which was likely to cause fear or alarm in or to the public or to disturb the public peace or to undermine public confidence in the conduct of public affairs... commits an offence.

The Antigua and Barbuda Constitution contained provisions that entitled every person to freedom of expression including freedom of the press (section 3b). The Constitution further provided that no person should be hindered in the enjoyment of his freedom of expression. But section 12(4) stated:

Nothing contained in or done under the authority of any law was to be held to be inconsistent with or in contravention of the constitution to

the extent that the law in question made provision – that is reasonably required... in the interest of public order...

The Judicial Committee held:

- (1) Section 33B of the Public Order Act, 1972, making an offence out of printing or distributing of any false statement likely to undermine public confidence in the conduct of public affairs contravened section 12(1) of the Constitution which protected every persons right to freedom of expression. This is so in so far as the words in question were applicable also to a false statement not likely to affect public order and were not reasonably required in the interest of public order,.
- (2) The Criminal proceedings would be quashed. See also *Attorney General of Gambia v Momodou Jobe* [1984] AC 689 (P.C.).

Synthetics and Chemicals Ltd v State of Up (1990) AIR 1927

The Supreme Court has observed that the meaning of the expression used in the Constitution must be found from the language used. The words of the Constitution should be interpreted on the same principle of interpretation as one applies to an ordinary law but these very principles of interpretation compel one to take into account the nature and scope of the Act, which requires interpretation. A Constitution is the mechanism under which laws are to be made and not merely an Act which declares what the law is to be. It is also well settled that a Constitution must not be construed in any narrow or pedantic sense and that construction, which is most beneficial to the widest possible amplitude of its power, must be adopted. An exclusionary clause in any of the entries should be strictly and, therefore, narrowly construed. No entry should, however, be so read as not to rob it of entire content. A broad and liberal spirit should, therefore, inspire those whose duty is to interpret the Constitution, and the Courts are not free to stretch or to pervert the language of an enactment in the interest of any legal or Constitutional theory. Constitutional adjudication is not strengthened by such an attempt. It must seek to declare the law but it must not try to give meaning on the theory of what the law should be. **It must look upon a**

Constitution as a living and organic thing and must adapt itself to the changing situation and a pattern in which it has to be interpreted. Where division of powers and jurisdiction in a federal Constitution is the scheme, it is desirable to read the Constitution in a harmonious way. It is also necessary that in deciding whether any particular enactment is within the purview of one Legislature or the other, it is the pith and substance of the legislation in question that has to be looked into.

It is well settled that the various entries in the three lists of the Indian Constitution are not powers but fields of legislation. The power to legislate is given by article 246 and other articles of the Constitution. The three lists of the Seventh Schedule to the Constitution are legislative heads or fields of legislation. These demarcate the area over which the appropriate legislatures can operate. It is well settled that widest amplitude should be given to the language of the three entries but some of these entries in different lists or in the same list may override and sometimes may appear to be in direct conflict with each other. It then becomes the duty of the Court to find out the true intent and purpose and to examine the particular legislation in question. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. In interpreting an entry it would not be reasonable to import any limitation by comparing or contrasting that entry with any other in the same list. It has to be interpreted that the Constitution must be interpreted as an organic document in the light of the experience gathered. The Court should, therefore, endeavour to interpret the entries and the powers in the Constitution in such a way that it helps in the attainment of undisputed national goals, as permitted by the Constitution.

***President of the Republic of Cyprus v House of Representatives*
(1987) 3 CLR 1655**

By a 1987 Law, the Cyprus Broadcasting Corporation was mandated to control the broadcast of views of Presidential candidates 10 days before the elections and to treat presidential candidates' broadcasts in a particular way six months before the elections. The President of the country, seeking unfettered access to the Radio and Television,

sought to have the Law struck down for curtailing his use of the media.

The Supreme Court held:

The exercise of the right of freedom of speech and expression safeguarded by article 19 of the Constitution, cannot be made either directly or indirectly obligatory. The sections that coerced the presidential candidates to appear in order to avoid the impression that they were avoiding public discussion among themselves were repugnant to and inconsistent with the Constitution.

The sub-judice Law was neither repugnant to nor inconsistent with the Constitution in so far as it did not prevent either directly or indirectly any citizen from contesting the office of President.

The notion of equality is identified with the intrinsic homogeneity of things ruling out distinctions among persons, objects and situations that are in essence dissimilar.

None of the provisions of the sub-judice Law limits directly or indirectly freedom of expression. Impairing comprehensive and unhindered information to the public about the positions of the candidates safeguards the functionability of democracy in Cyprus.

The correlation between the right of projection through CBC and the status of candidates on the one hand and the impact of their candidature among the people is interwoven with the functionality of the democratic regime.

Dewani Ungandan Negeri Kalantan and anor v Nordin bin Salley and anor (1992) Malayan Law Journal 797 (S8)

The respondents, resigned from one political party in which they had stood and were elected as members of the state legislature. The Legislature then passed a resolution by which the respondents ceased to be Members of the Assembly. The respondents successfully applied to the High Court to have the Resolution of the Legislative Assembly struck down for contravening their rights to resign membership of a political party. The state legislature appealed but the Supreme Court dismissed the same.

The Supreme Court held:

In testing the validity of the state action with regard to fundamental rights, what the court must consider was whether it directly affected the fundamental rights or its inevitable effect or consequence on the fundamental rights was such that it made their exercise ineffective or illusory.

The enunciation of the right to freedom of association in article 10(1)(c) of the Federal Constitution means a citizen's right to form, to join, not to join or resign from an association. Any restriction to dissociate from an association made the guaranteed right ineffective and illusory.

A Constitution should be construed with less rigidity and more generosity than other statutes and as *sui juris*, calling for principles of interpretation of its own suitable to its character but not forgetting that respect must be paid to the language which had been used.

In this case the Kelantan Constitution – a state law – by article XXXIA, imposed a restriction on the fundamental right of a member of the legislature to form associations, which of course includes the right to dissociate, and it operated by way of disqualification once the member exercised that right. It was inconceivable that a member of legislature could be penalised by any ordinary legislation for exercising a fundamental right which the Federal Constitution expressly conferred upon him subject to such restrictions as only Parliament may impose and that too on specified grounds, and on no other grounds.

The direct and inevitable consequence of article XXXIA of the Kelantan State Constitution, which was designed to enforce party discipline did impose a restriction on the exercise by members of the legislature of their fundamental right of association guaranteed by article 10(1)(c) of the Federal Constitution, and such restriction was not only protected by article 10(1)(c) of the Federal Constitution but clearly did not fall within any of the grounds for disqualification specified under section 6(1) of Part I of the Eighth Schedule to the Federal Constitution. By virtue of article 4(1) of the Federal Constitution, article XXXIA of the Kelantan Constitution was to that extent void.

In Malaysia, freedom of association was a fundamental right guaranteed by article 10(1)(c) of the Federal Constitution and could only be restricted on any of the grounds specified in article 10(2)(c) and (3), namely, in the interest of the security of the Federation or any part thereof, public order or morality.

Article XXXIA of the Kelantan Constitution imposed a restriction on the membership of a legislative assembly which infringed a citizen's right to form associations under article 10(1)(c) of the Federal Constitution. Such a restriction could not, by any stretch of imagination, be deemed necessary or expedient in the interest of the Federation or any part thereof, public order, morality or even labour or education. As article XXXIA of the Kelantan Constitution was inconsistent with the Federal Constitution which was the supreme law of Malaysia, it was therefore void under article 4(1) of the Federal Constitution.

Article 10(2) of the Federal Constitution provided that only Parliament may by law impose restrictions referred to in article 10(2), (3) and (4) of the Federal Constitution. The restriction imposed by article XXXIA of the Kelantan Constitution even if valid (which it is not) could not be imposed by a law passed by state legislature and as such article XXXIA should be invalidated.

The test to be applied in determining whether a statute infringed a particular fundamental right was as to what the direct and inevitable consequence or effect of the impugned state action was on the fundamental right. Article XXXIA of the Kelantan Constitution did impose a restriction on the exercise of the respondent's right of association in that the respondents were penalised by a disqualification from continuing as members of the State Legislative Assembly having exercised their fundamental right of association, which included the right to dissociate from an association, by resigning from one political party to join another. The direct and inevitable effect or consequence of article XXXIA was to make the exercise of the fundamental right of association of the respondents ineffective and illusory.

Fundamental rights inhere in every citizen including a legislator. The right claimed by the respondents to leave one political party and to join another is an integral part of the fundamental right

of association or at least partakes of the same basic nature and character as the freedom of association so that although the object of article XXXIA of the Kelantan Constitution may ostensibly be to curb defection from one political party to another, its direct and inevitable consequence is the abridgement of the respondents' right of association. For that reason, the impugned legislation was to be struck down.

A law which is invalid for unconstitutionality as in this case article XXXIA of Part.I of the Kelantan Constitution was held to be invalid *ab initio* and this made all decisions thereunder invalid. Nor could such a law be enforced or confer any legal right.

Since the respondent had been removed from the membership of the State Legislative Assembly of Kelantan pursuant to an invalid and void law, their removal was wrongful and consequently, the subsequent election of Haji Samat and Haji Mahmud was also wrongful. In the circumstances the High Court judge was entitled, in the exercise of his discretion, to declare accordingly and further declare that the respondents were entitled to reinstatement.

The orders made by the learned judge were of a consequential nature being consequent upon his having declared that article XXXIA(1) of the Kelantan Constitution was Constitutionally invalid. Order 15, rule 16 of the Rules of the High Court, 1980, conferred power upon the court to make binding declaration of right. Article 118 of the Federal Constitution and section 32 of the Election Offences Act 1954, relied on by the appellants, were therefore irrelevant to the issues arising upon his appeal, especially so as the respondents were not challenging the validity of the by-election upon any of the grounds stipulated under section 32 of the Act.

Although neither Haji Samat nor Haji Mahmud, being the persons interested in the subject matter of the declaration sought, were made parties to the proceedings in the High Court, the learned judge was not prevented from making the declarations prayed for, having regard to the very exceptional circumstances in this case. Even though there was no attempt by Haji Samat or Haji Mahmud to be made a party to the proceedings, nevertheless it could be

said that the State Legislative Assembly of Kelantan was, in reality, fighting the suit on behalf of them.

In the particular circumstances of the case, there were ample grounds to invoke the doctrine of substantive fairness the effect of which is that natural justice may impinge upon the substance of a decision. After considering the merits of the case it had been clearly demonstrated that even if Haji Samat and Haji Mahmud had been made parties to the proceedings in the court below, the result of the litigation would have been the same so that it could not be said that there was a real likelihood of their having suffered any prejudice. It follows that their non-joinder is a matter which should be condoned in the exercise of the court's discretion.

As for the non-joinder of the Election Commission in the proceedings in the court below, this in no way prevented the learned trial judge from granting the declaration prayed for in the exercise of his discretion. The Election Commission was merely charged with the responsibility of conducting the election and it would be indifferent to the result of the election, its rights being in no way at stake. In any event, even had it been made a party to the proceedings in the court below, it would have made no difference to the result of the litigation, so that it could not be said that there was a real likelihood of it having suffered any prejudice.

In construing Constitutional documents it is axiomatic that the highest of motives and the best of intentions were not enough to displace Constitutional obstacles. Whenever legally permissible the presumption must be to incline the scales of justice on the side of the fundamental rights guaranteed by the Constitution, enjoying as they do, precedence and primacy.

Joshua Lumina v Attorney General and Anor of Zambia (1991)
Supreme Court of Zambia

The appellants were elected as members of the National Assembly under one party system introduced in Zambia in 1972. Article 13 of the Constitution was part of Part III, which guaranteed the fundamental rights and freedoms of the individual.

By article 4A introduced by Amendment Act 20 of 1990, Constitutional changes ushered in a multiparty system of government. The appellants promptly resigned from the single party UNIP and formed the new Movement for Multiparty Democracy (MMD), a new political party formed on December 20, 1990.

Held by five Judges of the Supreme Court:

There can be no doubt that article 4 restricted the fundamental rights and freedoms of the individual as enshrined in articles 13, 22, 23 and 25. But when article 4 was repealed, those fundamental rights and freedoms were revived and given their full effect. Consequently articles in conflict with those fundamental rights and freedoms guaranteed by articles 13, 22, 23 and 25 are therefore ineffective. Thus articles 67c and 71(2)(b) are also discriminatory in so far as they purport to restrict the rights of individuals to sit in the National Assembly unless they are members of UNIP.

***Marbury v Madison* ICRANCH 137 (1803)**

The National elections held in the USA in 1800 ended with a dramatic result in that country. The then President, John Adams, was defeated by Thomas Jefferson. The Federalist colleagues of Adams were also massively defeated in the Congress, which became dominated by the Jeffersonians.

But just before the elections, and, seeing the impending defeat, the Federalists created numerous judicial posts to which they appointed their supporters to take refuge in. One of these was Marbury, whose instruments of office, (commission) were in the ensuing transition, caught before he received them. Indeed many such appointment letters, were caught in the transition and were cancelled although a few were allowed by the new government to be handed to the appointees as a gesture of good will. Marbury sought to enforce his appointment. He applied to the Supreme Court for orders that the government must deliver to him his Judicial appointment. He filed the application for a writ of mandamus to order the new Secretary of State, James Madison, to effect the appointment which had already been approved by the Senate and the instruments signed and sealed.

The outgoing Secretary of State, John Marshall, had been confirmed Chief Justice of the United States Supreme Court.

Mr. Chief Justice John Marshall delivered the unanimous opinion of the court:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected ... The principles, therefore, so established, are deemed fundamental; and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organises the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative Act repugnant to it; or that the legislature may alter the Constitution by an ordinary act.

Between these alternatives, there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative Acts, and, like other Acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative Act, contrary to the Constitution, is not law; if the latter part be true, then written Constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature, illimitable.

Certainly, all those who have framed Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be,

that an Act of the legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written Constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of, in the further consideration of this subject ... It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide the case, conformable to the law, disregarding the Constitution; or conformable to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty. If then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle, that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law. This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces to nothing, what we have deemed the greater improvement on political institutions, a written Constitution, would, of itself, be sufficient, in America, where written Constitutions have been viewed with so much reverence.

There are many other parts of the Constitution which serve to illustrate this subject. It is declared, that “no tax or duty shall be laid on articles exported from any state”. Suppose, a duty on the export of cotton, of tobacco or of flour; and a suit instituted to recover it. Ought judgement to be rendered in such a case? Ought the judges to close their eyes on the Constitution, and only see the law? ...

From these, and many other selections which might be made, it is apparent, that the framers of the Constitution, contemplated that instrument as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support! ...

Why does a judge swear to discharge his duties agreeable to the Constitution of the United States, if that Constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

APPENDIX

SYNOPTIC TABLE

THE 1967 Constitution AND THE DRAFT Constitution (DC) AT A GLANCE

1967	DC	REMARKS
The 1967 Constitution consists of Twelve (12) Chapters, 130 Articles and Two Schedules	The DC consists of Twenty (20) Chapters, 314 Articles and Four Schedules	Boundary of the districts omitted in the DC and new Schedules provide for ethnic composition of Uganda as at 1 February 1926; Oath of Allegiance and Presidential oath and 13 reserved powers of the Central Government
Chapt. 1 The Supremacy of the Constitution, Republicanism and Alteration of the Constitution.	Sovereignty of the people, supremacy of the Constitution, defence of the Constitution.	Sovereignty of the people again appears in Chapter 3.
Chapt. 2 Citizenship. Declaration of Ugandan citizens. Powers of Parliament to regulate, citizenship and treatment of citizens of other countries.	One unitary sovereign republic, official language and non-adoption of state religion.	The notion of a Sovereign republic in the DC is peculiar.
Chapt. 3 Fundamental Rights and Freedoms of the Individual. Protection of life, liberty freedom from enslavement, forced labour, from inhuman treatment, deprivation of property; protection of law, freedom of conscience, expression, assembly and association, movement and protection against discrimination on grounds of race etc. Also contains provisions for times of war or public emergency and earlier page and enforcement of protective provisions.	National objectives. Defines certain objectives and declarations, defines democratic principles, National unity and non-discrimination and echoes, the ten-point program of the NRM constrains provisions on protection and fundamental rights and freedoms, protection of women, the family, the aged, and disabled and a culture of Constitutionalism, and accountability. It provides for economic and social and cultural objectives, the environmental, foreign policy objectives and duties of a citizen.	The provisions of the DC do not create any Constitutional institution or right that can be justiciable through an enforcement mechanism. Almost all the provisions are repeated elsewhere e.g. sovereignty of the people, duties of citizens, environment. Entire Chapter needs to be reconsidered.

1967	DC	REMARKS
Chapt. 4 The Executive. Powers of President and Vice President, Ministers and the Cabinet.	Citizenship. Citizenship, by birth, abandoned children, registration, a national citizenship and immigration board, loss of citizenship, prohibition of dual citizenship duties of a citizen, powers of Parliament in relation to citizenship and interpretation.	See duties of a citizen in Chapter 3 DC; also see Chapter 2 of the 1967 Constitution. There is already an Immigration Act.
Chapt. 5 Parliament. Composition, procedure in National Assembly, summoning, prorogation and dissolution.	Fundamental Human Rights and Freedoms. Enjoyment of rights, protection of rights to life, liberty, dignity, and against inhuman treatment, slavery and forced labour, deprivation of property, right to privacy of person, home and other property, right to a fair hearing, protection of freedoms of the family, women, children, rights of disabled or handicapped people, right to culture, civic rights and activities, to clean and healthy environment, economic rights, administrative justice, laws made in emergencies, Detention without trial, derogation from human rights, review by Human Rights Commission, reports to parliament, enforcement of freedoms, creation of Human Rights Commission, its functions, powers, independence, expenses, removal of Commissioners and powers of Parliament to deal with commission.	Equivalent provision on fundamental rights appear in Chapter 3 of the 1967 Constitution.

1967	DC	REMARKS
Chapt. 6 Legislature and Executive powers, Police, Auditor General, Inspector General of Police, the Director of Public Prosecutions, prerogative of mercy, Treaty and war powers.	Representation of the people. Right to vote, Electoral Commission, its powers, independence, constituencies, appeals, expenses, organisation of elections, voting, political movement system, restrictions on political parties, the right to form political parties, on referendum on political parties, prohibition of one party and electoral laws.	The DC entrenches the movement system and restricts political parties.
Chapt. 7 Local Administrations, districts of Uganda and their administration.	The Executive. President and executive authority, absence of addresses, qualifications, elections, terms of office, conditions of service, removal, Vice-President, acting as President, Prerogative of Mercy, Cabinet, Ministers' oath, collective responsibility. Vote of Censure, attendance of Parliament, Attorney General, Director of Public Prosecutions, International Relations, emergencies and war.	
Chapt. 8 The Judicature. High Court of Uganda. Appointment of Judges, Tenure of Judges, oaths, interpretation of the Constitution and early hearing of Constitutional cases, Appeals and Judicial Service Commission.	Legislature. Establishment and terms of Parliament, composition, functions, qualification and disqualification of members, Speaker and Deputy Speaker and Tenure, right of recall, code of conduct, emoluments, membership, Clerk and Quorum voting, standing committees, retrospective legislation, other specified legislation, rules of procedure, sessions, dissolution of Parliament and immunities and residual powers.	

1967	DC	REMARKS
Chapt. 9 Finance. Consolidated Fund, expenditure, remuneration, Public Debt, Auditor General, payments to districts.	National Council of State, establishment, functions, procedure for resolving conflicts, emoluments.	The National Council of State can be dissolved automatically upon dissolution of Parliament.
Chapt. 10 Public Services of Uganda. Public Service Commission.	Administration of Justice, Judicial powers, participation of the people, Independence of the judiciary, Judicature, Supreme Court, Appeals, composition of Supreme Court, Chief Justice, functions, appointment of Supreme Court, Tenure of Justices of the Supreme Court, High Court, Jurisdiction, Interpretation of Constitution, early hearing, appointment of Judges, Principal Judge, tenure, Judges, Judicial Service Commission, its functions, Judicial officers, oaths, Parliamentary powers over courts.	The DC introduces trial by jury and mandates. Parliament to make Law providing for participation of the people. The issue of popular justice should be addressed as well as the RC courts introduced by statute in 1987.
Chapt. 11 Public Land. Uganda Land Commission.	Taxation, consolidated Fund, estimates, appropriation, contingency Borrowing powers, public debt, Central Bank, its functions, Audit Commission, its functions, Accountability.	The Chapter in the DC introduced the power of taxation and re-enacts the Bank of Uganda Act.
Chapt. 12 General and Miscellaneous provisions. Capital, official language, commissions, appointments and resignations, oaths, abolition of kingships, pending matters, succession to property contracts, Mailo Land Tenure, cessation of Constitution of April 1966, Constitution Interpretation.	The Public Service. Public Service Commission, its functions Teaching Service Commission, its functions, establishments, principal Secretaries, Pension and Interpretation.	The 1967 Constitution was amended by ordinary statute in 1993 to restore kingship. This is the last Chapter of the 1967 Constitution.

1967	DC	REMARKS
Chapt. 13	Local Government. Objectives, and structures, system, districts, boundaries of units, District Councils, elections, revocations of mandate, district Chief Executive, Chairman, Removals, Committees, functions, Vote of no confidence, Finances, Grants, Revenues, Relation with Central Government District Service Commission miscellaneous. R e m u n e r a t i o n , Parliamentary Control, interpretation, Transitional Provisions for Urban Authorities.	The decentralisation process has already been implemented after the passing of a statute.
Chapt. 14	Defence and National Security. Uganda Armed Forces, functions, Commanders, Appointments, Forces Council, Service Board, Presidential Command, Deployment abroad Laws by Parliament, Police Force, its command, Police Council, Service Board, its functions, Uganda Prisons, its Commissioner, Service Council, Service Board, Intelligence Organisations, National Security Council, its functions, Observance of Human Rights, Powers of Parliament.	There are existing laws on the Army, Police, Prisons, Intelligence organisations and a Police Bill is due to be debated leading to the enactment of a new Police Statute by the NRC.
Chapt.15	Inspectorate of Government Establishment. Removal of Inspector and Deputy Inspector, Functions, Jurisdiction, Independence of Inspectorate, accessibility, adequate funding and special powers of High Court, Reporting and Powers of Parliament.	There is an existing statute dealing with the Inspectorate of Government.

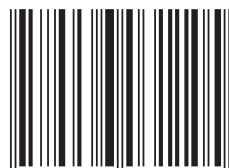
1967	DC	REMARKS
Chapt.16	Leadership Code of Conduct. Establishment of enforcement disqualification for breach of Code interpretation.	There is no Leadership Law.
Chap. 17	Land and Environment. Land ownership principles, Land Commission, Function District Committees, Tribunals, Minerals, Powers of Parliament, Protection of Environment.	
Chapt. 18	General and Miscellaneous. Traditional leaders, Administration of Estates, Law Reform Commission, Legal proceedings against Attorney General. Performance and functions of Commissions, resignations, re-appointments, interpretation of the Constitution.	The succession Laws are in place. There is a Law Reform Commission Statute, Government Proceedings Act.
Chapt. 19	Amendment of the Constitution. Positive power to amend, amendments requiring referendum i.e. on Supremacy of Constitution, political systems and one party state, amendments requiring, District Councils approval, other amendments, Certificate of Compliance with Chapter.	The idea of a referendum on fundamental rights and freedoms such as the right to form political parties is repugnant to the concepts of freedom and democracy.

1967	DC	REMARKS
Chapt. 20	Transitional Provisions. Transitional Government of NRM to continue until new one elected. Interim Electoral Commission, First President, existing Supreme Court and High Court, existing Judges and offices, appointment of Commissions, existing laws, enactments not yet in force, consequential amendments, existing commissions, pending matters, official seals, prerogative of mercy, devolution of rights and liabilities, succession of property and contracts, international agreements, treaties and covenants, interpretation, cessation of 1967 Constitution and 1986 Proclamation.	An interim coalition has been favoured in view of the underlying demand for extension of the incumbent government. These provisions should be seen in light of the import of Chapter 6 of the DC.

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Essays and Materials

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